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U.S. SECURITY ASSISTANCE
AND
FOREIGN MILITARY SALES

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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36 TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1988

U.S. SECURITY ASSISTANCE
AND
FOREIGN MILITARY SALES

by MAJ Sadi Cayci

ABSTRACT: This thesis examines an important element of the implementation of United States foreign policy, the U.S. Security Assistance Program and, more specifically, Foreign Military Sales. The Security Assistance Program is a principal means of support for the free world countries. It is an integral and essential part of U.S. foreign policy. This thesis concludes that, as the leader of the free world, the United States bears a great responsibility for ensuring that its Security Assistance Program is administered in an effective and cohesive manner. In order to accomplish this, the authority and responsibilities of both the U.S. executive and legislative branches must be more clearly defined.

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COMMON ACRONYMS

AECA	:	Arms Export Control Act of 1976
AID	:	U.S. Agency For International Development
ATMG	:	Arms Transfer Management Group
CIA	:	Central Intelligence Agency
CINC	:	Commander in Chief
DCS	:	Direct Commercial Sales
DFARS	:	DoD FAR Supplement
DISAM	:	Defense Institute of Security Assistance Management
DLA	:	Defense Logistics Agency
DSAA	:	Defense Security Assistance Agency
EAA	:	Export Administration Act of 1979 (P.L. 96 - 72, 93 Stat. 503)
ESF	:	Economic Support Fund
FAA	:	Foreign Assistance Act of 1961
FAR	:	Federal Acquisition Regulation
FARPAA	:	The Foreign Assistance and Related Programs Appropriations Act of 1985.

1

FFB	:	Federal Financing Bank
FID	:	Foreign Internal Defense
FMS	:	Foreign Military Sales
FMSA	:	Foreign Military Sales Act of 1968
FMSCR	:	Foreign Military Sales Credit System
GRF	:	Guaranteed Reserve Fund
IDA	:	International Development Association,
ISDCA	:	International Security and Development Cooperation Act of 1980
ITAR	:	International Traffic in Arms Regulations
JCS	:	Joint Chiefs of Staff
JSAM	:	Joint Security Assistance Memorandum
JSCP	:	Joint Strategic Capabilities Plan
LIC	:	Low Intensity Conflict
LOA	:	Letter of Offer and Acceptance
LOR	:	Letter of Request
MAAG	:	Military Assistance Advisory Group

MAP : Military Assistance Program

MDE : Military Defense Equipment

MDEL : Major Defense Equipment List

MFO : Multinational Force and Observers

MSAP : Military Security Assistance Projection

MTT : Mobile Training Team

NSC : National Security Council

OMC : The Office of Munitions Control

OPIC : Overseas Private Investment Corporation

PKO : Peacekeeping Operations

P & R : Planning and Review, DSAA.

SA : Security Assistance

SAAC : Security Assistance Accounting Center, DSAA.

SAFT : Security Assistance Field Training

SAMM : Security Assistance Management Manual

SAO : Security Assistance Office

SAP : Security Assistance Program

SME : Significant Military Equipment

TAFT : Technical Assistance Field Team
TAT : Technical Assistance Teams
UNFICYP : United Nations Force in Cyprus
UNPA : United Nations Participation Act
USDP : Under Secretary of Defense for Policy
WB : World Bank

U.S. SECURITY ASSISTANCE AND FOREIGN MILITARY SALES

I. INTRODUCTION

A. HISTORY ¹

1. WORLD WAR II

The Security Assistance Program is an important instrument of contemporary U.S. foreign policy. ² The U.S. foreign and military assistance programs began, for the most part, during World War II. Surplus military equipment was the principal source of grant aid. Until the 1960's, grants and loans were the primary forms of providing such assistance. In the decade that followed, greater emphasis was given to sales of defense articles and services.

Initially, through the Lend - Lease Act of 1941, (55 Stat. 3,) vast quantities of military supplies were furnished to both current and potential U.S. allies.

2. THE COLD WAR PERIOD

After World War II, as a result of the "cold war" between the Eastern and Western blocks, and to prevent further communist aggression and subversion, American military and economic assistance was extended to other states. Under the

¹ See: Evolution of U.S. Foreign Aid Programs: An Overview, Stanley J. Heginbotham, ch Cong Res Serv 6 8 5 - 7 s 85 - 314.

² Security Assistance As an Instrument of Policy, Andrew K. Semmel, Defense / 83, December 1983, pp. 16 - 21.

so called "Truman Doctrine", Greece and Turkey were among the first recipient countries.³

After the North Atlantic Treaty Organization (NATO) was established in 1949, under the Mutual Defense Assistance Act of 1949, (63 Stat. 714,) the United States again provided extensive military aid to help the other NATO members.⁴

3. DEVELOPMENT OF ARMS SALES

With the Kennedy administration's decision in 1961 that NATO should pay its way and the end of U.S. altruism, as Western European countries completed their economic recovery, the grant military aid programs were reduced, and a new period, in which arms sales played a significant role, began. The real turning point was marked by Fiscal Year (FY) 1967.⁵

³ A U.S. foreign assistance program first announced by President Truman in an address before Congress on March 12, 1947.

⁴ U.S. participation within the NATO organization later was provided by the Mutual Security Act of 1959, as amended, and the Mutual Security Act of 1954, as amended, see: **Legislation on Foreign Relations Through 1984**, Current Legislation and Related Executive Orders, Vol. I, U.S. Senate - U.S. House of Representatives, Committee on Foreign Relations - Committee on Foreign Affairs, March 1985, U.S. Government Printing Office, pp. 410, 411 - 415. **Collective Defense and Foreign Assistance**, National Security Management Series, Washington, Industrial College of the Armed Forces (National Defense University), 1968. **United States Military Assistance: A Study of Policies and Practices**, Harold A. Hovey, New York, Frederick A. Praeger, Publishers, 1968.

⁵ Security Assistance, Michael John Matheson, in "Operational Law", International Law Graduate Course Desk Book, ADI - 5, October 1987, TJAGSA, p. 14-26. Substantial grant military assistance programs remained in effect with Taiwan, Korea, Greece, and Turkey. See also: U.S. Security (Footnote Continued)

Each legislative year, in connection with the development of the budget, the foreign aid bill is a subject of intense interest. It is through this process that Congress addresses foreign policy issues around the globe, and more than half of the money authorized is allotted for military - related assistance. Since 1973, Israel and Egypt⁶ have been major recipients of such aid.

As a result of U.S. budgetary constraints, money devoted to foreign aid often results in cuts for domestic programs.⁷ This poses a difficult problem for lawmakers. Additionally, provisions of the foreign aid bill often reflect current policy considerations.⁸

(Footnote Continued)

Assistance to the Third World: Time for a Reappraisal, Noel Koch, 40 Journal of International Affairs, Special Issue: The Arms Trade, Summer 1986, page: 43.

⁶ "...a small reduction in aid to Israel would allow a much larger increase in aid to other countries. This is because Israel spends its aid much more quickly than most other recipients..." "House Panel Makes Major Cuts in Foreign Aid Appropriations", Pat Towell, The Congressional Quarterly, Weekly Report, published by the Congressional Quarterly, Inc., Vol. 45, No. 31, Aug. 1, 1987, page 1726.

⁷ In addition to these factors, the Gramm - Rudman - Hollings, (P.L. 99 - 177), "deficit - reduction act" should also be considered. This Act requires that appropriations bills should meet two ceilings: First, a ceiling on budget authority, and second another ceiling on outlays in the same FY. Each year both Houses struggle to reach a compromise. See: "House Panel Makes Deep Cuts in Foreign - Assistance Funding", Pat Towell, supra at no. 6, page 1900. "Reagan Facing Major Rebuffs in Defense Authorization Bill", Pat Towell, The Congressional Quarterly, id., April 4, 1987, page 616. "Disputes Dim the Future of Foreign Aid Bill", Steven Pressman, Congressional Quarterly, id., pp. 617-619.

⁸ House Passes Foreign Aid Authorization Bill, Steeven Pressman, The Congressional Quarterly, Weekly Report, published by the Congressional Quarterly, Inc., Dec. 12, 1987, pp. 3056-3058.

B. NIXON POLICY

In the context of U.S. military assistance development, 1969 is also a benchmark year, as this was the first year of the implementation of new legislation, the Foreign Military Sales Act of 1968, (P.L. 90-629). Concurrently, the Foreign Military Sales Credit Program was initiated.⁹

In 1969, President Nixon stated that, "[T]he United States would use its security assistance resources to bolster the military power of key regional states to the extent that those states were willing and able to preserve regional peace without direct U.S. military involvement." The result of this pronouncement was, in an effort to establish a tighter reign on the transfer of military technology, Congress' enactment of the AECA.¹⁰

C. CARTER POLICY

In 1976, the number of countries receiving grant military assistance was substantially decreased by Congress.

On May 19, 1977, President Carter, in order to contribute to a reduction in the worldwide arms traffic, ordered a substantial reduction in U.S. arms sales. He directed that arms transfers, as an element of foreign policy implementation,

⁹ The Congress and U.S. Military Assistance, Part I, Larry A. Mortsolof and Louis J. Samelson, The DISAM Journal, Vol. 9, No. 4, Summer 1987, page 67, (hereinafter will be cited as "Mortsolof - Samelson").

¹⁰ E. Graves & S. Hildreth, U.S. Security Assistance: The Political Process, 23, (1985), in "The Arms Export Control Act of 1976: An Arms Export Regulation That Failed", Eric J. Wittenberg, ASILS International Law Journal, Vol. X, Winter 1986, pp. 3 - 4.

be used only in instances in which they would contribute to U.S. security interests.

This policy concerning conventional arms transfers involved a series of controls, such as the placing of ceilings on the dollar volume of commitments that might be made to sell defense items to friendly nations and allies. Only certain allies were excluded from such controls.¹¹ Additionally, treaty obligations and "historic responsibilities" (toward Israel) were dealt with through specific legislative provisions. Coproduction agreements concerning significant weapons, equipment - beyond assembly of subcomponents and the fabrication of high turnover spare parts -, and major components were prohibited. These ceilings did not affect the backlog of undelivered defense articles already contracted for, however, and arms sales grew to over \$50 billion in FY 1980.¹²

D. TURNING POINT: REAGAN POLICY

Upon entering office, President Reagan revised the Carter arms sales policy, issuing a directive removing the

¹¹ NATO, Japan, Australia, and New Zealand.

¹² **Foreign Military Sales - Basis Principles and Guidelines**, (The Government Contractor BRIEFING PAPERS), (hereinafter will be cited as "Briefing Papers"), Federal Publications, Inc., No 87-12, November 1987, 14 pages. See also: Arms Transfer Policy - Statement of the President, Feb. 1, 1978, in: **United States Arms Transfer and Security Assistance Programs**, prepared for the Subcommittee on Europe and the Middle East of the Committee on International Relations, U.S. House of Representatives, by the Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress, March 21, 1978. U.S. Government Printing Office, Washington, pp. 174 - 175.

previously imposed ceilings on such sales.¹³ The transfer of conventional arms and other defense articles and services were viewed as an "essential element" of the U.S. "...global defense posture and an indispensable component of its foreign policy". All requests were to be considered on a case - by - case basis.¹⁴

¹³ July 8, 1981.

¹⁴ Matheson, Security Assistance, supra at no. 5, page 14 - 65.

II. SECURITY ASSISTANCE ¹⁵

A. OBJECTIVE

Security Assistance (SA) consists of "...statutory programs and authorities under which the U.S. may provide and/or regulate forms of assistance and sales to foreign governments and international organizations for the purpose of enhancing U.S./mutual security." ¹⁶

Thus, the principle objective of SA is the enhancement of U.S. strategic - global objectives and planning. These objectives may be established on either a regional basis or

¹⁵ For a general overview, see: **U.S. Military Sales and Assistance Programs: Laws, Regulations, and Procedures**, Report prepared for the Subcomm. on Arms Control, International Security and Science of the Comm. on Foreign Affairs, U.S. House of Representatives, Congressional Research Service, Library of Congress, July 23, 1985, U.S. Government Printing Office, 86 pages. **Perceptions of Security Assistance, 1959 - 1983: The Public Record**, Steven A. Hildret, eds., in "U.S. Security Assistance: The Political Process", Lexington, MA, Lexington Books, 1985, pp. 41 - 49. **Security Assistance: A Visual Overview**, BG Thomas A. Baker, USAF, Air Force Journal of Logistics, Summer 1984, pp. 18 - 19. **United States Arms Transfer and Security Assistance Programs**, supra at no. 12, 175 pages.

¹⁶ Operational Law, supra at no. 5, page 14-1. Needless to say, under Sec. 620(f) of the FAA, 22 U.S.C. Sec. 2370(f), those countries which have Communist regimes are not within the scope of security assistance. Additionally, there are specific provisions against countries which grant sanctuary to international terrorists: Sec. 620A, FAA, 22 U.S.C. Sec. 2371. See: **Security Aid Totals, Fiscal 1986 - 1988**, Congressional Quarterly, Jan. 17, 1987, Vol. 45, No. 3, page 115. **Foreign Military Sales and Military Assistance Facts**, Washington, Data Management Division, Comptroller, Defense Security Assistance Agency, (an annual publication). **Security Assistance: Helping Others Help Us**, Andrew K. Semmel, Defense / 82, November 1982, pp. 11 - 13.

on a country - by - country basis.¹⁷ Recipient countries of security assistance, in turn, provide the U.S. with basing, transit, overflight, port call and exercise facilities. Periodic joint exercises are an especially important factor in contributing to the U.S. global defense posture.¹⁸

Currently, there are five priority areas in U.S. foreign assistance. These are: A lasting peace in the Middle East; securing and maintaining access to military bases in allied and friendly countries; supporting countries which face Soviet or other communist military threats; economic development and relief of human misery; and finally, helping Central America build democratic institutions.¹⁹

B. ELEMENTS

¹⁷ See generally: Operational Law, supra at no. 5, page 14-1. Also see: The Implementation of the United States Security Assistance Program, LTG Philip C. Gast, USAF, The DISAM Journal, Vol. 9, No.4, Summer 1987, pp. 41-48, (hereinafter will be cited as, "Gast, The Implementation..."). Historical Look At Objectives of Foreign Aid: Congressional Action and Legislative Changes, 1961 - 1982, Jean Lewis, (unpublished paper; prepared for the Commission on Security and Economic Assistance), Georgetown University, 1983.

¹⁸ Congressional Presentation for Security Assistance Programs, FY 1988, The DISAM Journal, Vol. 9, No. 3, Spring 1987, page: 19.

¹⁹ "We think we get a good return on each dollar...Our foreign assistance programs give us the opportunity to be creative and helpful in shaping the kind of world..." Foreign Assistance and the U.S. National Interest, Michael H. Armacost, the DISAM Journal Vol. 8, No. 2, Winter 1985 - 1986, pp. 46 - 47.

The first U.S. SA objective is to enable U.S. allies and friends to meet threats to their security.²⁰ SA also assists the U.S. in securing en route access, overflight, transit, and base rights important to the rapid deployment of U.S. forces. By providing common weapons systems, SA also fosters interoperability between U.S. armed forces and those of its allies and friends. Finally, SA functions as a means of ensuring access to critical raw materials. Taken as a whole, the SA elements are critical to maintaining U.S. geopolitical influence.²¹

From a domestic perspective, the export of U.S. produced equipment generates foreign exchange which contributes to the U.S. gross national product. Additionally, SA production provides employment in key sectors of the U.S. economy.²²

C. LEGAL BASIS²³

1. THE FOREIGN ASSISTANCE ACT²⁴

²⁰ See: The Military Content of Security Assistance, Admiral W. J. Crowe, Jr., USN, The DISAM Journal, Vol. 9, No. 3, Spring 1987, pp. 46 - 50.

²¹ Operational Law, supra at no.5, page 14-2. Security Assistance: What Do We Get for Our Efforts? Dr. Michael W. S. Ryan, Defense 86, November - December 1986, pp. 24 - 31. Effectiveness of U.S. Security Assistance in Acquiring and Retaining Friends and Allies, Carlisle Barracks, Strategic Studies Institute, April 18, 1980.

²² Operational Law, supra. at no. 5, page 14 - 1.

²³ See generally: A Brief of Security Assistance Legislation, Dr. Leslie M. Norton, Air Force Journal of Logistics, Summer 1984, pp. 14 - 17.

²⁴ For the text, see: Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 11 - 202.

a) PURPOSE

The Foreign Assistance Act of 1961 (FAA), Part II, 22 U.S.C. 2301 - 2349aa - 6 establishes the principal legal framework for the U.S. security assistance system.

In general, the FAA has two principal purposes: Part I provides economic, agricultural, medical, disaster relief and other forms of assistance to developing countries, while Part II authorizes common defense assistance measures against internal and external aggression. The latter form of assistance includes the furnishing of military assistance to friendly countries and international organizations. Such assistance, in most cases, requires Congressional approval.

By law, FAA programs and the annually appropriated funds for their implementation are all administered by the Department of State.²⁵ This results from the fact that SA is planned and implemented as an integral part of U.S. foreign policy.²⁶

b) CONTENT

The FAA consists of three principal parts:

²⁵ The Annual Authorization Act - including military assistance - is entitled, "The International Security and Development Cooperation Act of [Year]". The corresponding Annual Appropriations Act, on the other hand, is entitled "Foreign Relations and Related Programs Appropriations Act, [Year]." See: Mortsof - Samelson, supra at no. 9, p. 78. For samples, see: International Security Assistance Act of 1977, and Foreign Assistance and Related Programs Appropriations Act, 1984, in "Legislation on Foreign Relations Through 1984", supra at no. 4, pp. 325 - 328, 403.

²⁶ Operational Law, supra at no. 5, p. 14-18.

Part I concerns, economic, agricultural, medical, and disaster relief. The purpose of this form of assistance is to foster the efforts of the developing countries.

Part II of the FAA deals with defense assistance, and, finally, Part III provides general administrative provisions. Under Sec. 660, FAA, 22 U.S.C. 2420, FAA funds cannot be used to provide training, advice, or financial support to police, prisons, or other law enforcement forces of a foreign government. Similarly, these funds cannot be used for internal intelligence or surveillance programs on behalf of a foreign government. Only longtime democracies which do not violate human rights and have no standing armed forces are exempt from this provision. ²⁷

In practice, the details of these provisions and, if deemed necessary by the United States Government (USG), other additional restrictions are effected in bilateral agreements entered into with specific countries. ²⁸

²⁷ The FAA of 1986. Costa Rica and some Caribbean countries all within this category. El Salvador and Honduras are also specifically exempted.

²⁸ Additional restrictions may include, a proscription against using U.S. arms, without U.S. consent, for defense of other countries, or using certain types of weapons only under specified conditions. However, the important question is that of who determines whether the weapons or other defense articles are being used in compliance with these provisions of the FAA and similar provisions of specific bilateral agreements and the AECA. For instance, after the Republic of Cyprus was founded in 1960, Greek Cypriots started a systematic campaign of annihilation against Turkish Cypriots. This was the continuation of efforts initiated by the Greek Cypriot terrorist organization, EOKA, in 1955. The so called "Akritas Plan" which called for eliminating Turkish - Cypriots from the island within 24 hours, before Turkey could actually intervene to prevent this from occurring is well known. In the same way that the
(Footnote Continued)

For each fiscal year (FY), through the adoption of the foreign aid bill, some of the funds are "earmarked" by Congress for particularly important countries²⁹ or projects.

2. THE ARMS EXPORT CONTROL ACT³⁰

a) INTRODUCTION

On June 30, 1976, President Ford signed into law, The International Security Assistance and Arms Export Control Act of 1976. This Act brought several changes to the area of Foreign Military Sales (FMS). First, the title of the Foreign Military Sales Act (FMSA) was changed to the Arms Export Control Act (AECA), the legal basis for the Foreign Military Sales Program. (FMS).³¹ Foreign Military Sales are

(Footnote Continued)

U.S. has come to the assistance of certain groups in Central America, the Turkish government considered effecting a humanitarian intervention in order to protect the lives of the Turkish Cypriot community. Actually, as a guaranteeing party to the 1960 London and Zurich agreements, in concert with Greece and the United Kingdom, by which the Republic of Cyprus was founded, Turkey was under a legal, as well as a moral obligation to intervene. Having received information concerning this plan, President Lyndon B. Johnson sent a letter to Turkish Prime Minister Ismet Inonu, noting the limiting provisions of Sec. 502, FAA. This letter created long lasting negative effects in the Turkish population, sensitive to Turkey's independence and sovereignty.

²⁹ Such as Israel, Egypt, Pakistan, Philippines.

³⁰ The Revised Arms Export Control Regulations, Eric L. Hirschorn, ABA, INT'L LAW, Vol. 19, No.2, Spring 1985, pp. 675 - 687. For the text of the act, see: Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 203 - 251.

³¹ See: International Security Assistance and Arms Export Control Act of 1976, in Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 329 - 336. The Congress and U.S. Military Assistance, Part II, Larry A. (Footnote Continued)

governed by the Arms Export Control Act of 1976, (AECA) 22 U.S.C. 2751 - 2796c, P.L. 90 - 629. Subject to revision on an annual basis through the International Security and Development Cooperation Acts, the Act contains complex and sensitive legislative requirements, prohibitions and limitations,³² including provisions concerning leases and loans regarding foreign military sales.³³

Under the control of the Department of State, and, through government - to - government agreements, the AECA provides for the transfer of arms and other military equipment, as well as defense services.

b) PURPOSE³⁴

(Footnote Continued)

Mortsolz - Louis Samelson, The DISAM Journal, Vol. 10, No. 1, Fall 1987, p. 25.

³² For instance, U.S. military trainers or advisers are barred from accompanying any third country units which are engaged in combat.

³³ Leases are not commonly utilized today. See: Some Legal Issues Regarding Leases and Loans Under the New Chapter 6 of Arms Export Control Act, MAJ Richard J. Erickson, USAF, The DISAM Journal, Vol. 4, No. 4, Summer 1982, pp. 102 - 103. Appropriateness of Procedures for Leasing Defense Property to Foreign Governments, General Accounting Office, Rep. No. ID - 8136, Apr. 27, 1981.

³⁴ It is questionable as to whether the act has achieved its stated purposes. See: The Arms Export Control Act of 1976: An Arms Export Regulation That Failed, Eric J. Wittenberg, supra at no. 10, pp. 1 - 37. Arms Export Control Act of 1976: Legislation Opposing Arms Sales, Richard F. Grimmet, 11 Cong Res Serv Rev 7 2 6 - 9 F 86 - 314. The Arms Export Control Act: Proposals to Improve the Observance of American Arms Law, Comment, 12 N. Y. U. J. Int'l L. & Pol., 135 - 136, (1979).

The purpose of AECA transactions is expressed in Sec. 4, AECA.³⁵ Both defense articles and services may be provided for such purposes as internal security and legitimate self-defense and to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security.

These provisions of the AECA enable the U.S. to monitor world events and serve as an "umpire" or "world policeman" with respect to the arms and services it will or will not provide to various countries. This has the very real potential of creating negative feelings on the part of friendly and allied nations concerning such U.S. actions.

c) MAIN TOPIC: FOREIGN MILITARY SALES

By enacting the AECA, "the Congress intended to give itself a legislative veto to more stringently control the transfer of arms."³⁶

In effecting an FMS case, DoD either purchases certain military equipment or services from U.S. firms under regular governmental procurement procedures, or, under certain conditions, takes the equipment from U.S. stocks and sells these items to a foreign government or international organization.³⁷

³⁵ A similar provision is found in Sec. 502, FAA.

³⁶ The Arms Export Control Act of 1976..., Wittenberg, supra at no. 10, page: 18.

³⁷ Operational Law, supra at no. 5, p. 14-21.

FMS is not an assistance program. It is implemented at no cost to the United States. Nevertheless, AECA authorizes the President to finance sales of defense articles and services or to guarantee such financing.

d) DEFINITIONS ³⁸

As previously noted, the AECA addresses the transfer of defense articles and defense services and providing training to third countries. Therefore the legal definitions of these and other related terms need to be mentioned.

For the purposes of the AECA, except in relation to commercial exports, "DCSs", [paragraph (7), Sec. 47, Chapter 4, AECA];

Defense Articles are defined as those materials which appear on the U.S. Munitions list;³⁹ such as, any weapon, weapon system, munition, aircraft, vessel, other implement of war; property, installation, commodity, material, equipment, supply, or goods used for the purposes of making military sales; machinery, facility, tool, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, or use of these articles.

³⁸ Chapter 4, Sec. 47, the AECA, in "Legislation On Foreign Relations Through 1984", supra at no. 4, pp. 246 - 247.

³⁹ The U.S. Munitions List is issued by the State Department under the provisions of the "International Traffic in Arms Regulation" - known as "ITAR" -, which contains a detailed list of firearms, ammunition, missiles, etc. subject to export controls applicable to the selling of defense articles and services by private parties.

Significant combat equipment is considered as **Significant Military Equipment (SME)**.

Any item of significant combat equipment on the U.S. Munitions List having a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million is considered as **Major Defense Equipment (MDE)**.

Excess Defense Articles are the quantity of defense articles in property of the USG which are not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order. These are "...in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all [DoD] Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations..." under the FAA.⁴⁰

Defense Service is defined as furnishing of assistance to foreigners in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, service, test, inspection, repair, maintenance, modification, reconstruction, training, publication, technical or other assistance, or defense information aimed at making military sales.⁴¹

Training is formal or informal instruction of foreign students in the U.S. or overseas by officers or employees of the U.S., contract technicians, or contractors (includes instruction at civilian institutions), or by correspondence

⁴⁰ Sec. 47(1), AECA; Sec. 644(g), FAA.

⁴¹ Sec. 47, AECA; 22 U.S.C. 2794. ITAR, Sec. 120.8.

courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces.⁴²

e) COMBATANT ACTIVITIES

Advisory and Training Assistance associated with an FMS Case is executed through Mobile Training Teams (MTTs), Technical Assistance Teams (TATs), and Technical Assistance Field Teams (TAFTs).⁴³ Any personnel who perform these defense services within the scope of the AECA are not allowed to perform duties of a "combatant nature". This prohibition includes every kind of duty related to training and advising provided outside the U.S. that may engage U.S. personnel in combat activities.⁴⁴

3. OTHER SOURCES OF AUTHORITY⁴⁵

⁴² Sec. 47(5), AECA.

⁴³ DoD Directive 5132.10 - Security Assistance Technical Assistance Field Teams.

⁴⁴ Sec. 21(c)(1), AECA, 22 U.S.C. 2761(c). Some countries have departments which have functions in both law enforcement and defense areas. For example in Turkey, the gendarmerie is a part of the Turkish Armed Forces. With respect to their primary function, however, these forces are directed by the Ministry of Interior and are in charge of law enforcement. They also execute operations against subversive elements. Law enforcement activities are often undertaken as para - military action and may be executed by the army or special police forces. Thus, a U.S. decision to provide or finance the sale of defense articles and services within the context of low intensity conflict (LIC) concept should have taken into consideration of such particular situations..

⁴⁵ Some of the sources represent certain periods, more specific arrangements; like, International Security and
(Footnote Continued)

a) EXECUTIVE ORDERS (E.O.)

Several Executive Orders may directly or indirectly affect the SA process.

(1) E. O. 12163

The Administration of foreign assistance and related functions, in general, is the subject of Executive Order 12163, dated September 29, 1979, 44 F.R. 56673.

This E.O. concerns the U.S. International Development Cooperation Agency, [establishment, delegation of functions regarding FAA; sec. 402 of the Mutual Security Act of 1954, 22 U. S. C. 1922; sec. 413(b) of the International Security Assistance and Arms Export Control Act of 1976, etc.], the Department of State, (delegation of functions), the Department of Defense, (delegation of functions, reports and information), and other agencies, additional delegations and limitations of authority; consultation (general delegation of functions, personnel, special missions and staffs abroad, international agreements, interagency consultation), reserved functions (reservation of functions to the President), funds, and general provisions (definition, references

(Footnote Continued)

Development Assistance Authorizations Act of 1983, in "Legislation on Foreign Relations Through 1984", supra at no.4, pp. 252 - 256. International Security Assistance Act of 1979, in Legislation on Foreign Relations Through 1984, id., pp. 304 - 306. Special International Security Assistance Act of 1979, in Legislation on Foreign Relations Through 1984, id., pp. 307 - 310. International Security Assistance Act of 1978, in Legislation on Foreign Relations Through 1984, id., pp. 315 - 320.

to orders and acts, prior executive orders, saving provisions, and effective date).⁴⁶

(2) E. O. 12066

E.O. 12066, June 29, 1978, 43 F.R. 28965 deals with the inspection of foreign assistance programs, principles concerning assignment of duties and responsibilities, and administrative matters regarding the Inspector General of the Foreign Service.⁴⁷

b) DELEGATIONS OF AUTHORITY

The administration of arms export controls is the subject of the provisions of E.O. 11958, January 18, 1977, 42 F.R. 4311. With this E.O., the President delegated some of the authority provided to him by the AECA to the Secretary of State. The remainder of the provisions concern coordination with the Secretary of Defense and certain other heads of departments and agencies, and the allocation of funds.⁴⁸

⁴⁶ It has been amended by a number of other Executive Orders, principally, E.O. 12226, July 22, 1980, 45 F.R. 49235, E.O. 12321, September 14, 1981, 46 F.R. 46109, E.O. 12365, May 24, 1982, 47 F.R. 22933, E.O. 12423, May 26, 1983, 48 F.R. 24025, E.O. 12458, January 14, 1984, 49 F.R. 1977, and finally, E.O. 12500, January 24, 1985, 50 F.R. 3733. For details, see: Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 438-448.

⁴⁷ Legislation on Foreign Relations Through 1984, id., pp. 466-467.

⁴⁸ This has been amended by Executive Orders No. 12118, February 6, 1979, 44 F.R. 7939, No. 12163, September 29, 1979, 44 F.R. 56673, No. 12210, April 16, 1980, 45 F.R. 26313, No. 12321, September 14, 1981, 46 F.R. 46109, No. 12365, May 24, 1982, 47 F.R. 22933, and No. 12423, May 26, 1983, 48 F.R. 2405. See: Legislation on Foreign Relations Through 1984, id., pp. 468-470.

Within the Department of State, the principal delegation of SA authority is the State Department Delegation of Authority No. 145, February 4, 1980, 45 F.R. 11655. It addresses the 1961 FAA and certain related acts. The functions delegated to the officers of the Department of State (such as the Under Secretary for Security Assistance, Science and Technology; the Under Secretary for Management; the Legal Adviser; the Assistant Secretary for International Narcotics Matters; and the Director of the Office for Combatting Terrorism) are set forth in detail. Certain other functions are delegated to other agencies, and some functions are reserved to the Secretary of State alone. There are also some general provisions. ⁴⁹

c) ARMED FORCES LEGISLATION AND REGULATIONS

(1) LEGISLATION

The principal legislation affecting Department of Defense (DoD) involvement in the SA Program is Title 10 U.S.C. Sec. 133b, which deals with such topics as the Secretary of Defense's responsibility to report to Congress regarding sales or transfers of defense articles valued at \$50 million or more.

Sec. 975 prohibits sale of certain defense articles from the stocks of the Department of Defense.

⁴⁹ This delegation of authority has been amended by Delegations of Authorities No. 145-1, July 15, 1980, 45 F.R. 51974, No. 145-2, February 4, 1984, 49 F.R. 7018. Legislation on Foreign Relations Through 1984, id., pp. 449-452.

Other important topics are sec. 2213, cooperative military airlift agreements, sec. 2401a, procurement of communications support and related supplies and services, and sec. 2457, the standardization of equipment with North Atlantic Treaty Organization Members. ⁵⁰

(2) OTHER REGULATIONS ⁵¹

(a) IN GENERAL

In addition to the AECA of 1976, the FAA of 1961, and ITAR (found in 22 CFR), there are several other laws and regulations affecting SA: Title 22, U.S.C., which pertains to foreign relations; National Policy and Procedures for the Disclosure of Classified Military Information to Foreign Governments and International Organizations (U) (NDP - 1) (S); 10 U.S.C. Sec. 2667, leasing authority, and the Export Administration Act of 1979, 50 U.S.C., dealing with foreign boycotts. Finally, the Federal Acquisition Regulation, "FAR", is the principal regulatory guidance applicable to procurements made for FMS transfers.

(b) DEPARTMENT OF DEFENSE

DoD 5105.38 - M, the Security Assistance Management Manual establishes the framework for DoD administration of Security Assistance.

⁵⁰ Legislation on Foreign Relations Through 1984, id., pp. 471-478.

⁵¹ For a detailed list of sources, see: Security Assistance Source References, The DISAM Newsletter, Vol. 3, No. 4, Summer 1981, pp. 41 - 48.

Other relevant DoD documents include:

Defense Acquisition Regulations, Sec. 6, parts 13, 14 and 16;

DoD Directive 2000.3 - International Interchange of Patent Rights and Technical Information;

DoD Instruction 2000.8 - Cooperative Logistics Support Arrangements;

DoD Directive 2000.9 - International Co - Production Projects and Agreements Between the U.S. and Other Countries or International Organizations;

DoD Directive 2000.10 - Selection and Training of Security Assistance Personnel;

DoD Directive 2100.3 - United States Policy Relative to Commitments to Foreign Governments Under Foreign Assistance Programs;

DoD Instruction 2110.8 - Transfer of Releasable Assets of the DoD to Eligible Foreign Countries and International Organizations on a Foreign Military Sales Basis;

DoD Instruction 2110.29 - Method of Financing, Funding, Accounting and Reporting for Foreign Military Sales to Friendly Foreign Governments and International Organizations;

DoD Instruction 2110.31 - Contributions by Foreign Governments for Administrative and Operating Expenses of Military Assistance Programs;

DoD Instruction 4155.16 - Processing Requests from Foreign Governments or International Organizations for Inspection of Direct Procurements;

DoD Directive 5030.28 - Munitions Control - Procedures for U.S. Munitions List Export License Applications Referred to DoD by Department of State;

DoD Directive 5132.3 - Department of Defense Policies and Responsibilities Relating to Security Assistance;

DoD Directive 5410.17 - An Informational Program for Foreign Military Trainees and Visitors in the U.S.;

DoD Instruction 6310.6 - Disposition of Allied Country Patients by Department of Defense Medical Installations;

DoD Directive 6310.7 - Medical Care for Foreign Personnel Subject to the NATO Status of Forces Agreement;

DoD Instruction 7290.1 - Method of Financing, Funding, Accounting and Fiscal Reporting for the Military Assistance Grant Aid Program; and,

DoD Directive 5160.66 - Defense Institute of Security Assistance Management (DISAM).

(c) MILITARY DEPARTMENTS

The primary guidelines for each military department are principally found in DoD Instructions and Directives. The

following are some of the most relevant Army and Air Force documents: ⁵²

i) THE U.S. ARMY

- AR 12 - 1 Security Assistance - Policies and Responsibilities;
- AR 12 - 2 Executive Agent Designation for Selected Army Security Assistance Functions / Activities;
- AR 12 - 6 Munitions Control Program;
- AR 12 - 7 Technical Assistance Field Teams (TAFT) and Technical Assistance Teams (TAT);
- AR 12 - 8 Foreign Military Sales (FMS) Operations / Procedures;
- AR 12 - 15 Education and Training of Foreign Personnel by the United States Army.

ii) THE U.S. AIR FORCE⁵³

- AFR 400 - 20 - Administration of Military Assistance Programs,
- AFR 170 - 3 - Financial Management of the Security Assistance Program;

⁵² Concerning the Navy, see: Ship Transfers, in "United States Arms Transfer and Security Assistance Programs", supra at no. 12, pp. 152 - 173.

⁵³ For a more detailed list, see: Security Assistance Source References, The DISAM Newsletter, Vol. 4, No. 1, Fall 1981, pp. 50 - 52.

AFR 170 - 11 - Contributions by Foreign Governments for
Administrative and Operating Expenses of
Military Assistance Programs;

AFR 67 - 1 (Vol. IX) USAF Supply Manual, Security Assis-
tance Program Procedures;

AFR 400 - 3 - Foreign Military Sales;

AFR 400 - 22 - Performance of Contract Administration
Services on Direct Procurements for Foreign
Governments or International Organizations;

AFR 400 - 43 - Munitions Control Procedures for U.S. Muni-
tions List Export License Applications;

AFR 67 - 7 - Reporting and Processing of Discrepancy
Reports against Foreign Military Sales
Shipments;

AFR 75 - 43 - Transportation of FMS Materiel;

AFR 190 - 22 - Release of Unclassified Information to
Foreign Nationals;

AFR 205 - 2 - Release of Classified Foreign Intelligence
Material to U.S. Contractors;

AFR 53 - 22 - Management and Support of the Defense Insti-
tute of Security Assistance Management
(DISAM);

AFR 50 - 50 - Training for Security Assistance Personnel;

- AFR 50 - 29 - Education and Training of Foreign Military Personnel;
- AFR 50 - 4 - International Military Education Training Performance Reports;
- AFR 50 - 33 - Informational Program for Foreign Military Trainees and Visitors to the United States.

III. STRUCTURAL FRAMEWORK

A. THE STATE DEPARTMENT ⁵⁴

The SA process begins with the overall U.S. strategic planning and establishment of security goals conducted by the National Security Council (NSC). ⁵⁵

In general, the Secretary of State possesses the authority to provide the general direction, coordination, and supervision of U.S. overseas activities. Similarly, with respect to all issues concerning security assistance, under the direction of the President, the Secretary of State is the responsible authority of the executive branch. For example, the AECA states that the Secretary of State is responsible for the continuous supervision and general direction of FMS programs. This authority includes both determining country eligibility and establishing the amount of the sale that might be made. The Secretary of State is required to ensure that sales serve the foreign policy interests of the U.S. and complement other U.S. activities. ⁵⁶

In all these areas, the principal advisor to the Secretary of State is the Under Secretary of State for Security Assistance, Science, and Technology. He is responsible for coordinating SA plans, programs and activities conducted by U.S. military departments. He also chairs the Arms Transfer

⁵⁴ United States Security Assistance: The Role of the State Department, The DISAM Newsletter, Vol. 3, No. 4, Summer 1981, pp. 1 - 9.

⁵⁵ The National Security Act, P.L. 80 - 253.

⁵⁶ 22 U.S.C. Sec.2752(b).

Management Group (ATMG) ⁵⁷, which provides policy planning and reviews all SA matters. Finally, the Under Secretary also develops legislative initiatives.

The Bureau of Politico-Military Affairs is the State Department's principal point of contact with DoD. ⁵⁸

B. THE U.S. COUNTRY TEAM

In a given country, coordination of the SA program is accomplished by the U.S. Country Team. This team consists of representatives of all U.S. government departments which are in - country. The President is represented by the U.S. Ambassador; however, the Ambassador does not direct U.S. military forces operating in the field.

The Country Team's principal responsibility is the identification of potential sources of conflict, and, potential threats to U.S. interests in - country. If appropriate, the Team is responsible for establishing a well coordinated program designed to assist the economy, upgrade medical care, improve the transportation system, etc. To this end,

⁵⁷ ATMG is an advisory body to the Secretary of State comprised of senior level representatives from several government branches, such as the Office of the Secretary of Defense, the JCS, the DSAA, the Departments of Treasury and Commerce, AID, the Arms Control & Disarmament Agency, CIA, and the NSC.

⁵⁸ Within the Bureau of Politico-Military Affairs, The Office of Security Assistance and Sales supports overall U.S. foreign policy interests and national security objectives. The Office of Security Assistance & Special Projects coordinates executive branch proposals in relation to security assistance. Throughout the annual budget cycle, it also acts as the State Department's liaison with Congress. The third office is The Office of Munitions Control (OMC).

the Country Team, taking into consideration the host country's capabilities and potential security threats, assesses the needs of the country and recommends political, economic, and, possibly, military assistance.

C. THE DEPARTMENT OF DEFENSE

1. INTRODUCTION

The principal task of DoD regarding FMS Program is the implementation and oversight of the logistics aspects of arms sales. The key point of contact for SA within DoD is the Under Secretary of Defense for Policy (USDP).

2. DEFENSE SECURITY ASSISTANCE AGENCY

Established in August, 1971, by DoD Directive 5105.38, The Defense Security Assistance Agency (DSAA), is DoD's focal point with regard to the FMS process. "A primary function of the DSAA is to act as the coordinator of the political considerations of the State Department and the military considerations of the Defense Department."⁵⁹ It executes perhaps the most technically complex aspects of the entire SA process.⁶⁰

⁵⁹ The Implementation of the United States Security Assistance Program, Gast, supra at no. 17, page:42.

⁶⁰ The Management of Security Assistance, Defense Institute of Security Assistance Management, Wright - Patterson AFB, Ohio 45433, Third Edition, August 1982, (TJAGSA Library Cat. No. UA 12 M.29 1982). For examples of problem areas, see: Coproduction Under FMS: A Case Manager's Headache, Mr. Ben Havilland and LTC William C. Leeper, USAF, DISAM Journal, Vol. 8, No. 2, Winter 1985 - 1986, pp. 76 - 79.

The Director of the Defense Security Assistance Agency is the head of this DoD SA office, while the Under Secretary of Defense for Policy (USDP) is the legal authority with respect to the oversight and supervision of the DSAA staff.

The DSAA is comprised of an Office of the Director, a General Counsel, a Congressional Liaison staff, a Plans Directorate, [which consists of the Organization and Manpower Division, the Weapons Systems Division, the Special Defense Acquisition Fund (SDAF) Division, and the Support Division in Plans], an Operations Directorate, and an Office of the Comptroller (consisting of the Budget Division, the Financial Reports and Credit Programs Division, "FR & CPD", the Training Management Division, the Data Management Division, "DMD", the FMS Control Division, "FMSCD", and the FMS Financial Management Division, "FMD").⁶¹

For FMS cases involving significant military equipment or equipment of a sensitive nature, a DSAA coordinated interdepartmental approval is necessary. The recipient's military capabilities, the sensitivity of the item, the capability of the foreign government or international organization to support and maintain the items, and other relevant issues are carefully reviewed. Other FMS sales may also require close DSAA review and approval, such as a sale valued at \$10 million, or any sale to be made on credit.⁶²

3. JOINT CHIEFS OF STAFF

⁶¹ For more detailed information, see: Mission and Responsibilities of the Defense Security Assistance Agency, The DISAM Journal, Published by the Defense Institute of Security Assistance Management, Vol. 9, No. 4, Summer 1987, pp. 49-55. The Defense Security Assistance Agency, The DISAM Newsletter, Vol. 4, No. 3, Spring 1982, pp. 1 - 8.

⁶² Briefing Papers, supra at no. 12.

The Joint Chiefs of Staff (JCS) are responsible for ensuring that SA programs complement the Joint Strategic Capabilities Plan (JSCP) and the Joint Security Assistance Memorandum (JSAM). JCS must coordinate and concur in all military - related SA policy, plans, guidance, and individual country Security Assistance Organization (SAO) and Unified Command SA recommendations.

4. MILITARY DEPARTMENTS ⁶³

DoD component agencies ⁶⁴ are responsible for detailing the pricing, contracting, production follow - on, delivery and support of FMS material. ⁶⁵ In accomplishing these tasks, the military departments are assisted by the Defense Logistics Agency (DLA). DLA is the principal supplier and provider of materials for services' FMS transactions. It also conducts DoD generated FMS excess properties' sales.

The Military Departments (Army, Navy, and Air Force) also play a role in the planning process. Military departments must obtain data on costs, schedules, configuration, etc. for FMS sales subject to DSAA review. ⁶⁶ The Departments also provide administrative support and other resources and participate in developing, negotiating, and executing

⁶³ A Comparison of the Foreign Military Sales (FMS) Process in the Army, Navy, and the Air Force, MAJ Wesley L. Johnson, USA, Assistant Professor - Mr. William D. Carey, The DISAM Newsletter, Vol. 4, No. 1, Fall 1981, pp. 64 - 69.

⁶⁴ Military Departments of the DoD.

⁶⁵ This includes preparing data for program planning and budgeting, procuring and delivering materials, preparing P/A statements and LOAs, and coordinating necessary training and logistics support.

⁶⁶ Briefing Papers, supra at no. 12.

agreements related to SA programs. Finally, they are the principal players in the implementation of Foreign Internal Defense (FID) Programs.

Unified Commands / Commander - in - Chiefs are responsible for assimilating country security assistance programs, developing SA programs for their geographical areas of responsibility, and forwarding these programs to JCS.

Component Commands of Unified Commands implement SA programs within individual countries. A principal function is to advise on the capabilities and limitations of allied and friendly forces.

5. SECURITY ASSISTANCE ORGANIZATIONS

Security Assistance Organizations (SAO) are located in allied / friendly countries. These are a part of the Country Teams, and their personnel have limited diplomatic status. SAO's have the responsibility of providing in - country management for SA programs.⁶⁷

⁶⁷ Sec.515, FAA.

IV. CONTROL AND OVERSIGHT MECHANISMS ⁶⁸

A. LEGAL BASIS OF CRITERIA ⁶⁹

1. U.S. NATIONAL INTEREST

Any form of SA is provided, principally, in furtherance of U.S. national (diplomatic and security) interests. ⁷⁰ As previously noted, SA is an important element of U.S. foreign policy, and there is an important connection between its implementation and the relations the U.S. maintains with countries around the world.

In keeping with this national interest concept, Congress carefully reviews a foreign nation's opposition to U.S. foreign policy. Since 1983, within the provisions of the

⁶⁸ There are several problem areas regarding security assistance programs. For some contractual questions, see: Problems in Security Assistance, Claliborne Pell, 40 Journal of International Affairs, supra at no. 5, pp. 33 - 42.

⁶⁹ There are several legislative prohibitions regarding security assistance. Some of these are common in nature. See: Mortsof - Samelson, supra at no. 31, pp. 44 - 46. For violations of the use provisions governing the transfer or purchase of defense articles and services, see: Sec. 3(c), AECA (22 U.S.C. 2753). For FMS credit sales of sophisticated weapons to some underdeveloped countries, see: Sec. 4, AECA (22 U.S.C. 2754); for drugs, see: Sec. 481(h)(1), FAA, 481(h)(4), FAA, (22 U.S.C. 2291); for break in diplomatic relations, see: Sec. 620(t), FAA, (22 U.S.C. 2370); for military coups, see: Sec. 513, P.L. 99 - 591. Others concern specific countries: Mortsof - Samelson, id., pp. 46 - 48. The most important provisions will be examined in the following sections.

⁷⁰ See: Foreign Assistance and the U.S. National Interest, Michael H. Armacost, supra at no. 19, pp. 42 - 48. Arms Transfer and the National Interest, "Current Policy", U.S. Department of State, No: 279, Washington: Bureau of Public Affairs, May 21, 1981.

"Annual Joint Continuing Appropriations Resolution", Congress has excluded countries opposing U.S. foreign policy from the SA Program. One criteria for this evaluation is a country's voting record in the United Nations. However, in practice, such evaluations have not proven to be very effective, and the executive branch has endeavored to convince Congress not to overreact to U.N. voting statistics.⁷¹

2. HUMAN RIGHTS⁷²

In the case of a consistent pattern of gross violations of internationally recognized human rights and fundamental freedoms by a SA recipient country, the provisions of the "Kennedy Amendment", (Sec. 502B, FAA, 22 U.S.C. 2304), call for the termination of SA provided to such a country, to include FMS and direct commercial sales.⁷³ Moreover, the President is required to provide annual human rights reports to Congress concerning the human rights practices of all countries which receive U.S. security assistance.⁷⁴

⁷¹ Mortsolf - Samelson, supra at no. 31, pp. 31 - 32.

⁷² See: Human Rights and United States Security Assistance, James W. Moeller, 24 Harward Int L Journal, pp. 75 - 101, (1983). Conditioning U.S. Security Assistance on Human Rights Practices, S. B. Cohen, Am. J Int L 76: 246 - 79 Ap. '82, pp. 246 - 279.

⁷³ See: Human Rights and U.S. Foreign Policy, Richard Schifter, The DISAM Journal, Vol. 10, No. 1, Fall 1987, pp. 17-19.

⁷⁴ In recent years, Argentina, Chile, El Salvador, Guatemala, and the Philippines have been the focus of Congressional concern. See: Mortsolf - Samelson, supra at no. 31, page 30.

Promotion of human rights and fundamental freedoms is an important aspect of U.S. foreign policy. The executive branch, in developing the annual human rights report to submit the Congress, evaluates all SA recipient countries. If such evaluations are conducted realistically, they may serve a valid purpose. However, if unique conditions existing in a certain country are not taken into consideration, the resulting evaluation may be completely invalid. For example, a developing country has many social, economic, political and cultural problems which may be exploited by subversive groups. In such countries, individual rights and freedoms may represent that country's ideals, but not its realities. In these countries, the important issue is whether such a country is sincerely working toward the promotion of human rights and freedoms. For example, an official governmental policy declaring an acceptance of universally accepted minimum rules of prison conditions is desirable. However, if we compare prison conditions in country "A", where citizens' annual average personal income is under \$1,000, with the United Kingdom, one cannot legitimately expect prison conditions within these countries to be identical in nature. In order to achieve this, country "A" would have to ensure that its prison population enjoyed better living conditions than its average citizens.

This is a very sensitive issue and must be assessed objectively. Such issues must not become "politicized", that is, utilized for the purpose of achieving completely unrelated political goals. This form of double standard places U.S. long term mutual relationships with certain countries at risk.

3. INTERNATIONAL TERRORISM

Any country which grants sanctuary to international terrorists, or in which an insecure airport is located, thus

resulting in that country being designated as a "high terrorist threat country" by the Secretary of State, is subject to having all SA terminated.⁷⁵

4. NUCLEAR TRANSACTIONS

Certain nuclear transactions are subject to Sections 669-670, FAA, the "Symington - Glenn Amendment" (PL 94-329). Sec. 669, FAA, regulates nuclear enrichment transfers, and Sec. 670, FAA, regulates nuclear reprocessing transfers, transfers of nuclear explosive devices, and nuclear detonations.

Unless a country agrees to international supervision of its nuclear program, designed to ensure that such a program is not being utilized to develop weapons, this amendment prohibits the provision of assistance to a country suspected of taking steps to develop nuclear weapons, such as the development of enriched uranium.⁷⁶

Under Sec. 669(b)(1), FAA, the President may furnish assistance which would otherwise be prohibited if he determines, and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, that the termination of such assistance would have a serious adverse effect on vital U.S. interests and that he has received reliable assurances that the country in

⁷⁵ Sec. 620A, FAA, 22 U.S.C. 2371, as amended in 1985; Sec. 3(f), AECA, 22 U.S.C. 2753j. See: Mortsoff - Samelson, supra at no. 31, page 31, 44.

⁷⁶ See: Pakistan Nuclear Issue, in "House Panel Makes Major Cuts in Foreign Aid Appropriations", Pat Towell, the Congressional Quarterly, Weekly Report, Vol. 45, No. 31, Aug. 1, 1987, page 1726.

question will not acquire or develop nuclear weapons or assist other nations in doing so.

Similarly, under Sec. 670(2), the President may furnish assistance to such countries if he determines that the termination of such assistance would be seriously harmful in respect to the achievement of United States' nonproliferation objectives or would otherwise jeopardize the common defense and security.

In accordance with these provisions, for six years through FY 1987, Pakistan, which has been reported to be attempting to develop nuclear weapons, has been exempted from the applicability of such provisions. The Reagan Administration, as a part of its FY 1988 budget request, has requested another six year waiver for Pakistan.

5. EXPROPRIATION OF U.S. PROPERTY

Originally applied to Cuba, under Sec. 620 (e) (1), FAA, the "Hickenlooper Amendment", states "... if a country nationalizes or expropriates or seizes ownership or control of property owned by a U.S. citizen or by a corporation, partnership, or association not less than 50% beneficially owned by United States citizens, or takes steps to repudiate or nullify existing contracts or agreements with any U.S. citizen or any corporation, partnership, or association not less than 50% beneficially owned by U.S. citizens, or imposes or enforces discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or takes other actions which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned, and fails within a reasonable time to take appropriate steps, such as arbitration, to discharge its obligations under international law toward such citizen or entity..." security assistance to such a country may be

suspended until the President is satisfied that appropriate steps are being taken to compensate the party involved.

These provisions may be waived by the President, if he determines and certifies that such a waiver is important to the national interests of the United States.⁷⁷

6. ARREARS IN PAYMENT

If a particular country is 12 months in arrears on payments owed the United States Government (USG), Sec. 620(q), FAA, the "Brook Amendment", calls for a complete termination of any form of funded U.S. assistance to such a country, such as, FMS loans, MAP, IMET, ESF, etc., and there exists no "escape clause" providing authority to the President to grant a waiver.⁷⁸

7. COUNTRY - SPECIFIC PROVISIONS

The Congress, through country, and sometimes, issue - specific legislation, mandates or proscribes U.S. activities in certain countries. Generally, it utilizes such legislation to restrict the eligibility of certain countries to

⁷⁷ Appropriate relief for confiscation or expropriation of property must first be sought through host country courts. In other words, both administrative and judicial local remedies should be exhausted. Several questions have arisen in this regard. What authority may the U.S. Congress exercise over another country's courts, if any? In order to reach a pacific settlement, suppose the USG entered into negotiations with the host country government. To what extent may it legally be possible to make local court decisions subject to administrative assessment? Needless to say, the local government is also bound by its constitution and the principle of "separation of powers" concept in a democratic state system.

⁷⁸ Mortsol - Samelson, supra at no. 31, page 33.

receive security assistance. These country - specific provisions generally are in the form of amendments to the FAA and AECA, but may sometimes appear in other sources, such as the International Security and Development Cooperation Act of 1981 or the Annual DoD Appropriations Act.⁷⁹

A representative sampling of country specific provisions follows:

a) ANGOLA

Sec. 560, P.L. 99 - 591, proscribes any foreign assistance funds appropriated for FY 1987 or otherwise made available pursuant to P.L. 99 - 591 to be obligated to finance, indirectly, any assistance or reparation to Angola. Similarly, The "Clark Amendment", Sec. 118, ISDCA, 1980,⁸⁰ consists of provisions concerning Angola. Security assistance to this country is proscribed; however, the President may, after taking into consideration U.S. national security interests, certify that the provision of security assistance to Angola is essential to U.S. security interests.⁸¹

⁷⁹ For Cuba, see: Sec. 620(a), FAA, 22 U.S.C. Sec. 2370(a); for Mozambique, see: Sec. 512, Foreign Assistance and Related Programs Appropriations Act (FARPAA), 1985, 130 Cong. Rec. H 11872, Oct. 10, 1984; and for Libya, Iraq, South Yemen, Cambodia, Cuba, Laos, Vietnam, Syria, see: Sec. 513, FARPAA; Sec. 560, P.L. 99 - 591. Afghanistan: Sec. 620(d), FAA, (22 U.S.C. 2374, 1979, P.L. 96 - 53). See: Mortsoff - Samelson, supra at no. 31, pp. 46 - 48.

⁸⁰ P.L. 96-533, 94 Stat. 3131.

⁸¹ There are similar provisions concerning Kampuchea (Sec. 1005 of the Department of State Authorization Act, FYs 1984-1985, P.L. 98-164, 97 Stat. 1017), and Nicaragua (Sec. 8066, Department of Defense Appropriation Act, 1985, 130 Cong. Rec. H 11884, Oct. 10, 1984).

b) ARGENTINA

Sec. 725 of the International Security and Development Cooperation Act of 1981 attempts to establish a balance between Argentina's human rights practices and U.S. national interest: "... [I]f the President has submitted ... a detailed report certifying that... the Government of Argentina made significant progress in complying with internationally recognized principles of human rights; and ...the provision of such assistance, credits, loan guarantees, defense articles, defense services, or export licenses is in the national interest of the United States.", "... assistance may be provided to Argentina under chapters 2, 4, 5, or 6 of Part II of the FAA of 1961..."; including participation in credits. "... [C]redits... may be extended and loans may be guaranteed ... under the AECA. Defense articles and defense services may be sold ... under the AECA, and export licenses may be issued to or for the Government of Argentina under sec. 38 of the AECA..."

c) CHILE

Sec. 557, P.L. 99 - 591, and Sec. 726, ISDCA contain provisions dealing with human rights practices in Chile. Also included is a provision concerning Orlando Letelier. With respect to this incident, the Chilean government is required to take those steps necessary to bring to justice individuals indicted by a U.S. grand jury in connection with this case.

d) EL SALVADOR

Sec. 537, P.L. 99 - 591, Sec. 545, P.L. 99 - 591, Title II, P.L. 99 - 591, Sec. 702(g), P.L. 99 - 83, and Sec. 728, FAA

provide detailed provisions concerning El Salvador. In order to ensure that SA may be continued to El Salvador, the President must make certifications concerning not only human rights, but must also speak to the control of the Salvadoran Armed Forces, the torture and murder of Salvadoran citizens by the Armed Forces, economic and political reforms, and free elections.

e) GREECE AND TURKEY:

With respect to FAA or AECA funds for Greece and Turkey, the President is required to certify that both countries intend to use the SA provided only for **defensive purposes** and **NATO obligations**. Additionally, MAP Assistance to Turkey for FY 1986 and FY 1987 has been contingent upon Turkey's not taking any actions designed to effect a permanent division of the territory of Cyprus.⁸²

⁸² Sec. 620C, FAA, Sec. 101(f), P.L. 99 - 83, Sec. 36(b), AECA. See: Mortsolf - Samelson, supra at no. 31, page 47.

V. THE RELATIONSHIP OF THE EXECUTIVE AND LEGISLATIVE
BRANCHES

A. EMERGENCY AUTHORITIES OF THE PRESIDENT

1. THE DRAWDOWN AUTHORITY

The provision of SA to a third country is a very complex process and normally requires substantial lead time. This is particularly true with respect to the programming, budgeting, and appropriation process. There are some exceptions to this rule, however.

Under Sec. 506 (a), FAA, "The Drawdown Authority", the President may determine and report to Congress, in accordance with Sec. 652, FAA, that an unforeseen emergency⁸³ necessitating immediate military assistance to a foreign country or to an international organization exists. Upon making this determination, the President may then direct a drawdown of defense articles from current DoD stocks and also provide military education and training. The monetary ceiling for this authority is \$75 million in a FY. It has been used in conjunction with recent conflicts in Chad and El Salvador.

2. THE WAIVER AUTHORITY

⁸³ The issue as to what constitutes an "unforeseen emergency" is a difficult one. A surprise attack directed at a U.S. ally or friendly country would constitute such an emergency. If there is any other U.S. law, or international agreement addressing such situations, however, the drawdown authority is not applicable. As a rule, a situation, to be classified as an unforeseen emergency, must be a situation exceeding the limits of other authorities.

Under Sec. 614 (a), FAA, the "Waiver Authority", the President may determine that the provision of SA to a particular country is important to the security interests of the United States. Or at furthering the purposes of the FAA, regardless of any other provisions of the FAA or any other act relating to receipts and credits accruing to the U.S.. If he makes such a determination, he may authorize the furnishing of limited assistance, such as making sales, (in a certain FY, not to be more than \$750 million in FMS cash sales, \$250 million in FAA and AECA funds), extending credit, and issuing guarantees under the AECA.

This authority, however, does not apply to other principal statutory restrictions. For instance, it is not possible to waive statutory restrictions and limitations concerning transfers of funds between accounts.⁸⁴ This same limitation on the waiver authority applies to the Clark Amendment in relation to military or paramilitary operations in Angola.⁸⁵

3. THE CLOAKING AUTHORITY

If the President certifies that it is inadvisable to specify the nature of the use of such funds, he is authorized to use up to \$50 million of the funds made available under the FAA for unspecified purposes. This authority, expressed in Sec. 614(c), FAA, is known as "The Cloaking Authority".

⁸⁴ Sec. 610(b), FAA, 22 U.S.C. 2360(b).

⁸⁵ Matheson, Security Assistance, supra at no. 5, page 14-60.

4. OTHER AUTHORITIES ⁸⁶

Sec. 552 (c), FAA, gives the President limited emergency transfer authority for peacekeeping operations, while Sec. 36 (b), AECA, relates to the limited authority of the President to waive the statutory waiting period for major arms transactions in emergency situations.

B. THE CONGRESS

1. INTRODUCTION ⁸⁷

U.S. Security Assistance is a very important means by which foreign governments may be influenced. ⁸⁸ Through SA, Congress, too, may influence and establish the foreign policy of the United States. ⁸⁹ In regard to Congressional

⁸⁶ While these authorities concern emergency situations, security assistance must also be taken into consideration in both peace time and wartime. For a comprehensive guide to practical issues, see: Security Assistance in Peace and War, COL Wayne P. Halstead, COL Murl D. Munger, Robert G. Darius, and Alwyn H. King, The DISAM Journal, Vol. 7, No. 1, Fall 1984, pp. 20 - 41. Wartime Role of Security Assistance and Foreign Military Sales: Planning for Emergencies, MAJ H. John Markulis, USAF, The DISAM Journal, Vol. 6, No. 4, Summer 1984, pp. 37 - 47. Security Assistance Procedures in Wartime, Peter L. Mentis, CPT, USA, U.S. Army Logistics Management Center, Fort Lee, VA, Logistic Studies Office, Project No. 914, March 1980.

⁸⁷ See also: Congressional Interest, in "United States Arms Transfer and Security Assistance Programs", id., pp. 112 - 124.

⁸⁸ The Politics of Pressure: American Arms and Israeli Policy Since the Six Day War, D. Pollock, 1982.

⁸⁹ See: Mortisolf - Samelson, supra at no. 31, page 22:
(Footnote Continued)

constituencies, FMS Programs are of great economic importance.⁹⁰ Similarly, certain domestic constituent groups and minorities are particularly interested in SA provided to certain countries.⁹¹

Prior to the AECA, when the Foreign Military Sales Act of 1968 (FMSA) was in effect, for six years - until 1974 - the FMSA required only reporting of "significant" arms sales semiannually to Congress by the Secretary of State. Consultation with and notification to Congress were not necessary. However, following Vietnam, military assistance of any kind came to be perceived as one of the most important causes of United States entanglement with Third World countries and thus a potential precipitator of direct involvement in future conflicts. This compound concern is a principal factor contributing to the current degree of control and oversight Congress exercises over SA. This desire for greater control was effected in the amendment of the FMSA, the "Nelson - Bingham Amendment", which placed into practice the current AECA.

(Footnote Continued)

"Congress regards arms transfers as a dangerous, albeit necessary, endeavor."

⁹⁰ The Role of Interest Groups in the U.S. Military Assistance Program, 1972 - 1982, Larry A. Mortsoff, Ph.D., (unpublished), dissertation, University of Cincinnati, 1984.

⁹¹ For example, as a result of pro - Greek lobbying, and despite major differences between Greece and Turkey, both NATO countries, as to population, (TR: 51 million, GR: 10 million,) area, (TR: 301,381 sq.mi., GR: 51,146 sq. mi.,) (See: The World Almanac, 1987, Pharos Books, New York, Editor: Mark S. Hoffman.) and Turkey's unique status of having the longest sea and territorial border with the U.S.S.R., possessing the Turkish Straits, and maintaining the second largest standing army among the NATO countries (800,000 men,) a SA ratio of 7 (GR)/ 10 (TR) has been implemented by Congress, without a valid legal basis, yet solely political reasons.

2. LEGISLATIVE PROCESS

Final authority to appropriate funds to finance the FMS program is vested in the Congress of the United States. Annually, during the appropriation process, Congress modifies and adds to restrictions on the SA process and, by doing so, substantially affects policies regarding FMS sales.⁹²

Executive branch presentations to Congress concerning SA programs, the budgetary process, and the authorization and appropriation acts all represent vehicles through which Congress may exert effective control over executive SA proposals.

The SA legislative process begins in the early days of the new calendar year. The Administration submits its proposed authorization and appropriation bills to Congress. At the same time, the Congressional presentation document for the SA program is also forwarded.⁹³ Generally, one important aspect of this submission is that it includes several requests for legislative amendments, to reflect requests for program modifications or additions.

During the legislative process, the House Foreign Affairs and Senate Foreign Relations Committees exercise

⁹² See: Foreign Aid Cutbacks: Minimizing the Pain, Congressional Quarterly Almanac, Vol. XLII, 99th Congress, 2nd Session, 1986, id., pp. 162 - 165. Foreign Aid Appropriations, Fiscal 1987, Congressional Quarterly, id., page 163.

⁹³ See: Congressional Presentation for Security Assistance Programs, FY 1988, supra at no. 18, pp. 12 - 31.

responsibility over SA proposals. The House and Senate Appropriations Committees also play important roles.

The formal hearings are held in the early spring. These include the testimony of key administration officials and representatives from several ethnic organizations who attempt to elicit Congressional support for special SA interests.

Congress may not complete the legislative process required for an appropriation bill before the FY ends. In such a case it adopts a continuing resolution that continues funding for current programs.

Additionally, if unusual or unexpected events arise, the executive branch may request supplemental authorization or appropriations acts.⁹⁴

Since FY 1982, all funding concerning foreign assistance activities has been dependent upon several annual Joint House Continuing Appropriations Resolutions.⁹⁵

3. CONGRESSIONAL REVIEW

⁹⁴ Such as, Supplemental Appropriations, 1985, in "Legislation on Foreign Relations Through 1984", supra at no. 4, pp. 372 - 395. 1981 Sinai Multinational Force and Observers Resolution, P.L. 97-132, 95 Stat. 1693; the 1982 Caribbean Basin Supplemental, Supplemental Appropriations Act, 1982, 96 Stat. 833; and the 1983 Lebanon Emergency Assistance Act, P.L. 98-43 (1983).

⁹⁵ Mortsolff - Samelson, supra at no. 9, pp. 70-71.

Under 22 U.S.C. Sec.2776, the President is required to present periodic reports to Congress concerning actual and projected FMS activities.

In certain cases, a Congressional review is required before the issuance of a letter of offer and acceptance (LOA).⁹⁶ If Congress, within 30 days after receiving the notice, objects to the proposed sale, the related LOA cannot be issued. This disapproval may be overridden only if the President determines that an emergency exists that requires that such a sale be made in the interest of U.S. national security.

At times, these legislative provisions place the Executive and legislative branches on opposite sides of certain foreign policy issues.⁹⁷

⁹⁶ Congressional review is required if the LOA is to be issued to sell defense articles or services for \$50 million or more; for design and construction services of \$200 million or more; or for major defense equipment of \$14 million or more.

⁹⁷ This often occurs in cases where covert actions are conducted. The Hughes - Ryan Amendment of 1974 requires the President to determine that a certain covert action is necessary to the national security of the U.S. The President was also required to notify all related Congressional Committees. In 1980, however, the number of committees was reduced to two, the House and Senate Intelligence Committees. In 1986, with respect to three direct arms sales to Iran, President Reagan avoided the Congressional notice requirements of the AECA by signing a finding which authorized the CIA to conduct a covert action. This authority of the President has its roots in his constitutional power as commander - in - chief, and the 1947 National Security Act (P.L. 80-253). The NSC and CIA were created by this law. Current law (1985) requires that when the President uses a covert action to transfer weapons to foreign governments or other guerrilla groups - such as the Contras he report to Congress. See: *The Hill Committees' Verdict: Highlights*, Congressional Quarterly, id., Nov. 21, (Footnote Continued)

Certain arms sales proposals exceeding certain dollar thresholds do not become effective unless reported to the Congress within a fixed period of time. The function of the time is to allow the Congress to examine the situation and, if it deems it necessary, disapprove it by a concurrent resolution of two Houses. Thus, the waiting period constitutes the mechanism through which Congress exercises the right to veto a sale by adoption of a concurrent resolution of disapproval.

Under Sec. 36(b), AECA, thirty days prior to the issuance of a letter of offer (in the case of NATO countries or Japan, Australia, or New Zealand, the period is 15 days,) to be made in connection with any government sale of defense articles and services for \$50 million or more, design and construction services for \$200 million or more, or any major defense equipment for \$14 million or more, the President is required to transmit a detailed certification of certain points to Congress.

In such a case, if the President certifies that there is an emergency which necessitates the sale in issue in the national security interests of the United States, he may waive this waiting period.

C. CONGRESSIONAL CONTROLS AND SANCTIONS

(Footnote Continued)
1987, p. 2848. See also: "Reagan Promises Congress He'll Tighten Covert Rules", John Felton, the Congressional Quarterly, Vol. 45, No. 32, Aug. 8, 1987, pp. 1780-1782; Sidestepping a Minefield: Executive Privilege, John Felton, Congressional Quarterly, id., page 1781. Military Aid - Including Contra Money - is Priority, John Felton, Congressional Quarterly, Jan. 10, 1987, Vol. 45, No. 2, pp. 61 - 62.

1. NELSON - BINGHAM AMENDMENT AND LEGISLATIVE VETO

The Nelson - Bingham Amendment was enacted as section 36(b) of the FMSA and provides that any government - to - government FMS sales with a value of over \$25 million may be blocked by the passing of a concurrent resolution of disapproval within twenty calendar days following the proposal of the sale to Congress. As Presidential approval is not required and a simple majority vote in each house is enough to pass a concurrent resolution, this action constitutes a legislative veto.

However, in practice, as seen in the 1975 sale of Hawk air defense missiles to Jordan and the 1977 proposed sale of Airborne Warning and Control System (AWACS) aircraft to Iran,⁹⁸ the Executive branch was never confronted with a successful concurrent resolution of Congressional disapproval in connection with an arms sale.⁹⁹

2. THE CHADDA DECISION ¹⁰⁰

⁹⁸ U.S. Military Exports and the Arms Export Control Act of 1976: The F - 16 Sale to Iran, Case W Res J. Int L 9: 407 - 24, Spring '77, pp. 407 - 424.

⁹⁹ See: Legislative Veto: Arms Export Control Act, Robert C. Byrd, U.S. Senator, W. Virginia, et. al., the DISAM Journal, Vol. 6, No. 1, Fall 1983, pp. 94 - 113.

¹⁰⁰ For more detail, see: Reseparating the Powers: The Legislative Veto and Congressional Oversight After Chadda, Note, 33 Clev. St. L. Rev. 145, (1984 - 1985). The Court Vetoes the Legislative Veto: Immigration and Naturalization Service v. Chadda, Note, 11 Ohio N.U. L. Rev. 841 (1984). Applying Chadda: The Fate of the War Powers Resolution, comment, 24 Santa Clara L. Rev. 697, (1984). Reactions to Chadda: Separation of Powers and Legislative Veto, 35 Syracuse L. Review, 685, (1984).

With the Supreme Court's decision in *INS. v. Chadda*, legislative veto provisions relative to advance reporting requirements appear to be unconstitutional.

The legislative veto was struck down by the Supreme Court in the Chadda decision on June 6, 1983. [*Immigration and Naturalization Service v. Chadda*, 103 S.Ct. 2764 (1983)].
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The Chadda decision dealt with the unconstitutionality of a one - house legislative provision. The Supreme Court ruled that a two - house legislative veto provision regarding the Federal Trade Commission Improvements Act of 1983 was unconstitutional. The decision prohibited Congress from statutorily delegating discretion to an executive officer and then later restricting this discretion by vetoing the legitimate exercise of the executive officer's power. The Court stated that "...[T]he legislative veto, although an efficient means of regulating executive power, was unconstitutional since the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 102

On February 12, 1986, President Reagan signed P.L. 99-247 into law. This statute, drafted to deal with the legislative veto problem, amended the AECA and substituted a "joint resolution" for the "concurrent resolution" of disapproval.

101 *INS v. CHADDA: The Administrative Constitution, the Constitution, and the Legislative Veto*, Elliot, 1983 Sup. Ct. Rev. 125 - 176, (1984).

102 Wittenberg, *The AECA of 1976*, supra at no. 10, pp. 31 - 32.

¹⁰³ It restores a portion of the authority Congress possessed prior to the Chadda decision; however, it is far less sweeping than the legislative veto. A joint resolution of disapproval may be vetoed by the President. ¹⁰⁴

3. "EARMARKED FUNDING"

Within the context of these efforts made toward limiting executive power, Congress has established a new practice called "earmarked funding". Through this mechanism, Congress compels the executive branch to allocate appropriated program funds at levels which, for the part, exceed the levels proposed by the Administration.

Israel, Egypt, Greece and Turkey are recipients of earmarked funds. ¹⁰⁵

D. GRAY AREA: FOREIGN POLICY AUTHORITY OF THE EXECUTIVE AND LEGISLATIVE BRANCHES ¹⁰⁶

¹⁰³ See: Mortsolf - Samelson, supra at no. 31, pp. 14, 25 - 27.

¹⁰⁴ U.S. Arms Sales and the Middle East, Richard G. Lugar, Journal of International Affairs, supra at no. 5, page: 30.

¹⁰⁵ "Since FY 1980, as a result of the Cyprus conflict and Congressional sympathies toward Greece (supported by an active Greek - American lobby), Congress has insisted that annual military assistance to Greece be provided at a level not less than 70 percent of that furnished to Turkey." This practice is known as the "7-10 ratio". See: Mortsolf - Samelson, supra at no. 9, page 75.

¹⁰⁶ Notes on Presidential Foreign Policy Powers, 11 Hofstra L. Rev. 413 - 443. (1982). The Presidential Monopoly of Foreign Relations, Berger, 71 Mich. L. Rev. 1, 48, (1972).

Congressional involvement in the conduct of foreign relations raises the issue of the executive - legislative relationship in the area of foreign policy. To what extent should Congress be involved in the formation and implementation of foreign policy? ¹⁰⁷ To what extent should Congress be able to limit executive branch authority in foreign policy matters? ¹⁰⁸

These questions have raised both domestic and international law considerations.

With respect to domestic law, these questions must be analyzed within the context of the constitutional principle of separation of powers. Inherent in this concept is the fact that there can be only one President and one Secretary of State.

The Constitution divides the foreign relations powers between the executive and legislative branches. The President is Commander - in - Chief of the Armed Forces and is authorized to negotiate international agreements. The Congress is authorized to declare war, to appropriate funds for the maintenance of the military forces, and to advise

¹⁰⁷ For example, with respect to the sale of five AWACS aircraft to Saudi Arabia in 1981, Congress wished to prevent the sale. However, lacking the required majority in the Senate to support the disapproval resolution, Congress could not prevent the sale of the aircraft: *Awacs Planes Transferred to Saudi Arabia*. See: *Congressional Quarterly Almanac*, 1986, page 376.

¹⁰⁸ For a list, see: Mortsolf - Samelson, *supra* at no. 31, pp. 49 - 50.

and consent to the ratification of treaties negotiated by the executive branch.¹⁰⁹

Congress should cooperate with the executive branch in exercising its authority regarding subjects of vital interest to the country. Although the Congress possesses and exercises the basic constitutional power to authorize the military assistance grant and sales programs,¹¹⁰ the executive branch must be empowered to exercise clear and realistic foreign policy powers. Consultation is of vital importance.¹¹¹ However, consistent intervention by Congress in every aspect of foreign policy on a daily basis may result, and it does result, in confusion on the part of the United States and its foreign counterparts.¹¹²

¹⁰⁹ In *United States v. Curtiss - Wright Export Corp.*, [299 U.S. 304 (1936)], the court ruled that, in foreign relations, only the President has the power to represent the nation. However, in *Zemel v. Rusk*, [381 U.S. 1 (1965)] the Supreme Court recognized that, in dealing with foreign relations, the President does not have unrestricted freedom of choice. Moreover, in *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579 (1952)], the Court ruled that the President, in issuing an order, must take his authority either from the Constitution, or from an act of Congress. (The AECA of 1976..., Wittenberg, supra at no. 10, page: 8, 9, 11).

¹¹⁰ Mortsoff - Samelson, supra at no. 31, page 22.

¹¹¹ Executive - Legislative Consultation on U.S. Arms Sale, Congress and Foreign Policy Series, Foreign Affairs Committee Print, December 1982, No. 7, U.S. Government Printing Office, 39 pages.

¹¹² "Congress today leans toward the direct micromanagement of military assistance, as evidenced by the growth over the period ... in FAA and AECA prohibitions, limitations, regulations, and reporting requirements." Mortsoff - Samelson, supra at no. 31, page 35. "Congress sits as judge and jury, deciding the merits of each transfer, on a case - by - case basis." The AECA of 1976..., Wittenberg, supra at no. 10, page: 16. "Congress (Footnote Continued)

From a practical point of view, some policy decisions, such as declaration of war, the introduction of U.S. military forces into hostilities, and the conclusion of international agreements are of great importance. Accordingly, the sharing these responsibilities is a practical necessity. Apart from these considerations, however, the executive branch must be allowed to exercise a greater degree of latitude in the foreign policy areas. In examining both the FAA and AECA, it is apparent that, subject to certain statutory prescriptions, Congress has authorized the executive branch to administer the military assistance grant and sales programs.¹¹³ Provisions providing the President with special authority are, unquestionably, extremely broad and are often seems ambiguous. Thus, establishing specific criteria for the exercise of such presidential authority,¹¹⁴ identifying specific items and services subject to this authority, and establishing a specific dollar amounts for transactions would be useful.

Of even more importance to the issue of separation of powers in the conduct of foreign policy are basic concepts of international law. Some "Congressional interventions" are incompatible with the concept of the independence of states. Certain Congressionally imposed restrictions in the area of SA pertain to matters which are issues of exclusive

(Footnote Continued)

has a role to play in these programs, but that role should not extend to the micromanagement of every country program, the infliction of individual caprices, quirks, likes and dislikes on each program." U.S. Security Assistance to the Third World, Koch, supra at no. 5, page: 56.

¹¹³ For example, concerning the President: Sec. 503, FAA; Sec. 21, AECA; Sec. 3, AECA; Concerning the Secretary of State: Sec. 2, AECA.

¹¹⁴ Problems in Security Assistance, Claiborne Pell, 40 Journal of International Affairs, supra at no. 5, page: 41.

domestic concern to "allied" and "friendly" countries and thus contrary to these provisions of the U.N. Charter which emphasize non - interference in the domestic affairs of the states.

From the standpoint of both domestic and international law, Congress should not unduly intervene in the conduct of foreign policy. No foreign country, particularly an ally or friend of the U.S. wishes to deal with two or more architects of U.S. foreign policy, concurrently. ¹¹⁵

¹¹⁵ Turkish public opinion, for instance, is very sensitive to this subject. When negotiations are conducted between the U.S. and Turkish governments regarding bilateral defense and economic cooperation agreements, and the U.S. Government is unable to keep the promises made or is able only to make a "best effort pledge" to obtain Congressional support for the provisions of the agreements, public opinion in Turkey is negatively affected. Similarly, U.S. SA legislation directed at specific countries which conditions even arms sales to these countries on matters of exclusive domestic concern harm relations between these states and the U.S.. Legislation of this nature is construed as an infringement on a state's sovereignty.

VI. FOREIGN MILITARY SALES 116

A. INTRODUCTION

Foreign military sales serve the national defense and foreign policy interests of the United States.¹¹⁷ Naturally, "[s]ales must be in the U.S. national interest."¹¹⁸ From the standpoint of the U.S., the principal objectives of FMS program are to promote democracy, to maintain an open, stable world economy and free enterprise, to prevent regional conflicts, and to enhance the internal stability of friendly countries.

¹¹⁶ See also: Foreign Military Sales, Foreign Military Construction Sales, and Military Assistance Facts, Defense Security Assistance Agency, (annual issues, FY 1979 through 1986). Foreign Military Sales: Benefits, Trends, and Implications, LTC Curtis S. Morris, Jr., USAF, The DISAM Journal, Vol. 6, No. 4, Summer 1984, pp. 20 - 29. American Arms Supermarket, Michael F. Klare, Austin TX: University of Texas Press, 1984. The ABC's of Foreign Military Sales, Signal, May 1983, pp. 95 - 102. The Law and Politics of Foreign Military Sales, Allan B. Green - Michael T. Janic, The George Washington Journal of International Law and Economics, Vol. 16, No. 3, 1982, pp. 539 - 577. International Agreements and the Transfers of U.S. Defense Articles and Services, MAJ Richard J. Erickson, USAF, The Reporter, Vol. 11, No. 3, June 82, Office of the Judge Advocate General of the Air Force, International Agreements VII - 23, pp. 69 - 75. Foreign Military Sales, in "United States Arms Transfer and Security Assistance Programs", supra at no. 12, id., pp. 46 - 81.

¹¹⁷ Arms Sales: The New Diplomacy, Andrew J. Pierre, The DISAM Journal, Vol. 4, No. 4, Summer 1982, pp. 9 - 25. The Global Politics of Arms Sales, Andrew J. Pierre, Princeton, N.J.: Princeton University Press, 1982. Arms Transfers and American Foreign Policy, A. Pierre Edition, 1979, (The Arms Transfer Phenomenon, Kemp & Miller).

¹¹⁸ Gast, The Implementation..., supra at no. 17, page: 43.

The Middle Eastern ¹¹⁹ countries and the Third World,¹²⁰ (especially the Near East and South Asia) are the major recipients and purchasers of arms transfers.

In constant 1986 dollars, the value of all U.S. arms transfer agreements with the Third World was the lowest since 1979. During the period of 1984 - 1986, the total value of U.S. arms transfer agreements with the Third World continually declined. In 1986, the total value of Third World arms transfer agreements with the major European suppliers was the lowest since 1979. Conversely, however, the total value of arms transfers made by the Soviet Union substantially increased in 1985 and 1986, most dramatically in Latin America. The People's Republic of China ranked fifth in total value of arms sales to the Third World.¹²¹

B. FOREIGN MILITARY SALES: "FMS CASES"

¹¹⁹ See: U.S. Arms Sales and the Middle East, Richard G. Lugar, 40 Journal of International Affairs, Summer 1986, supra at no. 5, pp. 23 - 31.

¹²⁰ See: U.S. Security Assistance to the Third World: Time for a Reappraisal, Noel Koch, 40 Journal of International Affairs, Summer 1986, supra at no. 5, pp. 43 - 57. Trends in Conventional Arms Transfers to the Third World By Major Supplier, 1977 - 1984, R. Grimmet, Congressional Research Service, The Library of Congress.

¹²¹ The term "Third World Countries" includes all countries except NATO nations, Warsaw Pact nations, Europe, Japan, Australia, and New Zealand. For comparative numeric tables, see: Trends in Conventional Arms Transfers to the Third World by Major Supplier, 1979-1986, Richard F. Grimmet, The DISAM Journal, Vol. 10, No. 1, Fall 1987, pp. 51-60.

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Foreign military sales involving the transfer of arms and services are government - to - government sales referred to as "cases". Thus, an FMS case is a contractual sales agreement between the USG and an eligible foreign country or international organization.

In essence, foreign military sales are not grant aid and, technically, should not be considered security assistance.¹²³ Actually, when related news take The price set forth in a letter of offer and acceptance (LOA) ensures that all United States Government (USG) costs incurred in the course of the FMS process be paid fully by the customer foreign government or international organization. For example, if an item is not be replaced, the FMS base price for sales from DoD stocks is the actual cost to DoD. At times, an item must be replaced. In such cases, the FMS base price is the replacement cost. Finally, for sales involving procurements, the customer pays the full amount of the DoD contract price.¹²⁴

¹²² See also: Foreign Military Sales Process, Defense / 82, November 1982, pp. 14 - 20. Foreign Military Sales: A Guide to the United States Bureaucracy, Harvey G. Sherzer, Michael T. Janik & Allen B. Green, Vol. 13, No. 3, J. Int'l L. & Econ. 545 - 599, (1979).

¹²³ "Security assistance is not a financial burden to the United States. To the contrary, even when the assistance we provide is grant aid, one study estimates that 65 percent of the money we spend to provide assistance is returned to the economy through the GNP multiplier. For assistance provided through FMS credit, it is estimated that the loan, plus two - thirds of the face value of the loan comes back to the U.S. economy." Krasna, Some Effects of the FMS Credit Program, in "U.S. Security Assistance to the Third World," Koch, supra at no. 5, page 55.

¹²⁴ Briefing Papers, supra at no. 12.

Through a complex process involving political, economic, military, financial, legal and moral considerations, the USG provides items from two sources: From DoD stocks, or from procurements through the governmental contracting process.

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2. DEFINITIONS

A letter of request by a foreign government or international organization may contain either a defined order or a blanket order, or, it may speak to a cooperative logistics supply support arrangement.

A Defined order is an order by which specified or quantified items, services, or training requests are forwarded by a foreign government.

A Blanket Order constitutes an indefinite quantity agreement between the purchaser and the USG. Here, only categories of the items or services are certain. The term of the agreement

¹²⁵ Excess Defense Articles Program, in: "United States Arms Transfer and Security Assistance Programs", supra at no. 12, pp. 132 - 135. For some problem areas, see: No Profit, No Loss - Not Always: Application of the Uniform Commercial Code to Reports of Discrepancy for Foreign Military Sales from Department of Defense Stocks, Commander F. David Froman, USN, DISAM Journal, Vol. 9, No. 3, Spring 1987, pp. 86 - 95. Dilemmas and Decisions in U.S. Security Assistance Policy: An Illustrative Focus on Aircraft Sales, LTC Patrick H. Corbett, USAF, The DISAM Journal, Vol. 6, No. 3, Spring 1984, pp. 24 - 38. Defense Department Split on Centralized Management of Foreign Military Sales, U.S. Export Weekly, No. 408, May 18, 1982, page 248. Growing Dilemmas for Management of Arms Sales, Armed Forces and Society, Fall 1979: 4. A New Approach is Needed for Weapon Systems Coproduction Programs Between the United States and Its Allies, General Accounting Office, Report No. PSAD - 79 - 24, Apr. 12, 1979.

is normally one year, and the LOA specifies a certain dollar ceiling.

Cooperative Logistics Supply Support Arrangements are peacetime logistics support arrangements. They are designed to provide continuous supply for U.S. produced military hardware.¹²⁶

The foreign government or international organization may make a request for sole source procurement. However, such a request must be justified.¹²⁷

"Offset Arrangements" are agreements by which the USG agrees to purchase a certain percentage of the total purchase price in goods or services from the customer. It is negotiated pursuant to an FMS sale. Generally, when the customer buys important defense items, such as aircraft or ships, the USG may agree to offsets. DoD policy is to normally avoid such arrangements, however.

3. COUNTRY ELIGIBILITY AND PRECONDITIONS

The first question to be addressed when considering an FMS case is whether the potential customer is an eligible FMS recipient. This occurs in the form of a Presidential

¹²⁶ Briefing Papers, supra at no. 12.

¹²⁷ For legal requirements concerning sole source procurement in view of the U.S. competitive procedure rule, see: Foreign Military Sales (FMS) Sole - Source Procurement: A Memorandum of Law, Jerome H. Silber, The DISAM Journal, Vol. 7, No. 2, Winter 1984 - 1985, pp. 38 - 45.

determination pursuant to Sec. 3(a) of the AECA. Absent this determination, the sale may not be made. ¹²⁸

The Arms Export Control Act (AECA) imposes certain **preconditions** on FMS. The President must determine that an FMS transaction will strengthen U.S. security and promote world peace. The foreign purchaser must agree to not **transfer** articles purchased to third countries. ¹²⁹ Additionally, purchasers must agree to not use articles purchased for **purposes** other than those for which they were supplied. ¹³⁰ This is a controversial provision, as it is difficult to reconcile this requirement with the sovereignty and independence of the state making the purchase. What individual or forum is to make the decisions concerning the purpose for

¹²⁸ Country eligibility is not determined on the basis of specifically designed criteria. A continuous effort aimed at fact specific evaluation results in policy determinations. See: Potential for Military Sales to the P.R.C. (China), John W. De Pauw, 9 East Asian Executive Reports, 12 (3) May 15, 1987. Jordan Arms Sale Put Off & China Arms Deal Goes Through, Congressional Quarterly Almanac, 1986, supra at no. 92, page 375. The Reluctant Supplier: U.S. Decisionmaking For Arms Sales, P. Hammond, D. Lousher, M. Salamone & N. Graham, Oelgeschlager, Gunn & Hain, Publishers, Inc., Cambridge, Massachusetts, (1983). U.S. Arms Sales Policy Background and Issues, Roger P. Labrie, John G. Hutchins, and W. A. Peura, Washington, D.C., American Enterprise Institute, Studies in Defense Policy, 1982, 87 pages. Changing Perspectives on United States Arms Transfer Policy, Report Prepared for the Subcomm. on International Security and Scientific Affairs of the Comm. on Foreign Affairs, H.R. Doc. No: 382 - 49, 97 th Cong., 1 st Sess. 10 - 32, (1981).

¹²⁹ Unauthorized Transfers of Defense Articles and Services, LCDR Thomas L. Martin, JAGC, USN, The DISAM Newsletter, Vol. 4, No. 1, Fall 1981, pp. 46 - 48.

¹³⁰ Briefing Papers, supra at no. 12.

which articles were purchased and whether their ultimate use was "lawful"? 131

131 For instance, in July of 1974, in order to prevent both the annexation of Cyprus to Greece and the Turkish Cypriot Community from being completely annihilated, Turkey effected a legal, as well as humanitarian, intervention into the Republic of Cyprus. (See: Why Solidarity for Cyprus? Published by the Public Information Office, Turkish Republic of Northern Cyprus, November 1983. See also, Why Independence? Published by the Public Information Office, Turkish Republic of Northern Cyprus, November 1983.) This intervention occurred after Greece seized the Cypriot government through a surrogate military coup undertaken by Nicos Sampson. Having violated its rights and duties under the 1960 London and Zurich Agreements, under which the Republic of Cyprus was founded, Greece was not in a position to fulfill its obligations as a party responsible for guaranteeing independence of Cyprus. Turkey and the United Kingdom were also guarantors of Cypriot independence and territorial integrity of the Republic of the Cyprus. Following a United Kingdom refusal to act of a Turkish request to act following the Greek seizure of Cyprus, Turkey was forced to act unilaterally. After Turkish intervention, the United States Congress, responding to the pressure of a strong Greek - American political lobby, implemented an arms embargo against Turkey. "Many members in Congress saw in the arms to Turkey issue an opportunity to underscore the principles for which the United States stands." Congressional - Executive Relations and the Turkish Arms Embargo, U.S. Congress, Committee on Foreign Affairs, Congress and Foreign Policy Series No. 3, Washington, D.C., Government Printing Office, June 1981, p. 30, in Mortisolf - Samelson, supra at no. 31, p. 28. The Turkish Government, in response, closed more than 20 U.S. military installations in Turkey. Surprisingly, after Israel's air attack on the Iraqi Osirak nuclear reactor on June 7, 1981 - which was not a single incident and was followed by others - the USG took no action in sharp contrast to the Turkish arms embargo. This to Turkey was the application of a double standard with past of Congress. Actually, "...it is difficult for the President to stick to any sanctions against Israel." Mortisolf - Samelson, supra at no. 31, pp. 28 - 29. See also: Amendments to Board for International Broadcasting Act of 1973, in Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 424 - 426.

Still another precondition of not is the fact that the foreign purchaser must agree to provide the same degree of security protection for these articles as does the U.S. The purchaser must agree that, absent the consent of the U.S., it will not transfer either title or possession of the articles purchased to any other party.¹³²

4. LETTER OF REQUEST

The initial request to purchase U.S. defense articles may come from a foreign country's Ministry of Defense to the in-country U.S. Ambassador, from a country's ambassador in the U.S. to the State Department, from a country to U.S. officials visit by these officials to the country, and finally, directly from a foreign country to the U.S.G. The majority of such requests, however, are processed, first, by the U.S. security assistance offices (SAOs) located overseas in foreign countries. This processing procedure will include a U.S. embassy assessment of the request.¹³³

¹³² Sec. 505, FAA and Sec. 3, AECA. there exist a variety of provisions designed to be applied to countries which substantially violate the provisions to which they have agreed in FMS cases. For example, Sec. 3(c), AECA, requires the President to report to Congress all possible violations. If the President reports a violation, the country in issue may be declared ineligible for credits, guaranties and cash sales. An exception to this rule exists, however. If the President certifies that a country's ineligibility will have a significant adversely impact on U.S. security, that country will not be declared ineligible for future FMS transactions. Moreover, Congress, through the adoption of a joint resolution, may declare that President's determination will not be given effect.

¹³³ Gast, The Implementation..., supra at no. 17, page: 43 - 44.

Generally, governments with less procurement experience prefer FMS to direct commercial sales (DCSs), ¹³⁴ thus benefiting from the USG's assumption of responsibility for both acquiring the items - at the lowest possible price - and administering the contract. ¹³⁵

5. PRICE AND AVAILABILITY ESTIMATES

A price and availability (P/A) determination is the provision of a price estimate or cost as well as availability data furnished in connection with a specific item. It is made by either a military service program or system, or, by an item manager.

6. LETTER OF OFFER AND ACCEPTANCE (LOA)

A "DoD Form 1513, LOA" is an official agreement between the USG and a foreign government. Its form and contents are prescribed by specific DoD guidelines in DoD regulations. Under the terms and conditions of this instrument, the USG contracts to sell defense articles or services. Specific details of the sales agreement, such as the items and/or services desired, and estimated costs are set forth in this document.

¹³⁴ An Overview of the International sale by the Defense Contractor: Some Current Issues, Joseph F. Dennin, in **International Transactions and the Defense Contractor**, (hereinafter cited as: "International Transactions..."), Section of Public Contract Law and the Division for Professional Education, American Bar Association, March 26-27, 1987, Washington, D.C., National Institute, page: 16.

¹³⁵ At times, it may be possible to consolidate DoD's own needs with those of a foreign purchaser, thus utilizing DoD's bargaining power to the advantage of the foreign government. See: Briefing Papers, supra at no. 12, page 9.

After the P/A data is reviewed by the foreign government and, if the data is acceptable, a formal LOA is requested from the USG. This LOA is negotiated by the foreign government with the U.S. Department of Defense (DoD). The signature of the contracting state or international organization on the LOA evidences acceptance. Following this acceptance, the cognizant DoD department ¹³⁶ - generally - procures the equipment for resale to the foreign government.¹³⁷

¹³⁶ DoD military departments: The Army, Navy, and the Air Force.

¹³⁷ Briefing Papers, *supra* at no. 12.

VII. DIRECT COMMERCIAL SALES ¹³⁸

A. SCOPE

Direct Commercial sales (DCS) are sales in which the parties are U.S. contractors and foreign governments. A government with experience in complex procurements may prefer direct commercial sales (DCSs). Thus, a country's contracting experience is generally the principal consideration involved in that country's decision regarding whether to purchase through normal FMS procedures or DCSs. ¹³⁹

In general, items such as classified defense articles and services, repair parts, or components usually carried in DoD stocks, and ammunition rounds which exceed 20mm in caliber are sold by government - to - government FMS procedures.

As a result of its regulation and financing of DCS, the USG plays an important role in such sales. ¹⁴⁰ DSAA, as a matter

¹³⁸ See also: Commercial Sales in "United States Arms Transfer and Security Assistance Programs", supra at no. 12, pp. 82 - 98.

¹³⁹ DCS is governed by general commercial law. If there is no FMS financing, the contractors have the least exposure to prosecution as a result of making false statements or false claims. See: An Overview of the International Sale..., in International Transactions and the Defense Contractor, supra at no. 134, page: 5, 11, 15.

¹⁴⁰ See: Export Controls on Commercial Sales of Militarily Critical Equipment and Technology, Harvey & Simon, Washington, D.C., in International Transactions ..., supra at no. 134, pp. 39-81. Recent Legislative Proposals Affecting International Defense Contracting, Edward J. Krauland, in International Transactions..., id., pp. 149 - 167.

of policy, encourages DCSs; ¹⁴¹ however, DCSs occur less frequently than FMSs. ¹⁴² Generally, if the requested articles are classified or a customer lacks the ability to make a purchase on its own, DSAA prefers that normal FMS procedures be utilized. ¹⁴³

In the case of FMS, the foreign purchaser is often required to make substantial advance payments. Similarly, the purchaser may ask the contractor to execute a payment bond and a performance bond.

B. REGULATIONS

Under Sec.38, AECA, "...in furtherance of world peace and the security and foreign policy of the United States, ..." the President is authorized to control the impact and the export of defense articles and defense services. By Executive Order No. 11958 (1977), as amended, the President has delegated this authority to the State Department, which administers such sales through the International Traffic in Arms Regulations (ITAR). ¹⁴⁴

Established by ITAR, the U.S. Munitions List lists those items subject to control and reflects detailed descriptions

¹⁴¹ Conventional Arms Transfers, Current Policy, No. 301, Washington, Bureau of Public Affairs, July 28, 1981.

¹⁴² What Would be the Impact of Raising or Repealing the Commercial Arms Sales Ceiling? General Accounting Office, Rep. No. ID - 80 - 9, (Jan. 4, 1980).

¹⁴³ Briefing papers, supra at no. 12.

¹⁴⁴ 22 C.F.R. Subchapter M, Secs. 121.01-133.56.

of the various categories of arms, ammunition and implements of war. ¹⁴⁵

The Export Administration Act (EAA) provides the Department of Commerce with the authority to regulate the export and reexport of non - military equipment and technology. The Export Administration Regulations issued by the Department of Commerce thus detail "dual use" (items having both military and civilian application) goods and technology. ¹⁴⁶

C. ADMINISTRATIVE PROCEDURES

Individuals who manufacture or export items included on the Munitions List must register with the State Department. Violations of arms export - import controls subject individuals to debarment, suspension, fine or imprisonment. ¹⁴⁷

The export of technical data relevant to items which appear on the Munitions List, also requires a licence issued by the State Department. ¹⁴⁸ This requirement applies to both the

¹⁴⁵ For example, various types of firearms, ammunition, munitions, missiles, propellants, explosives, naval vessels, military vehicles, military aircraft, spacecraft, military training equipment, military electronics, etc. Also see: U.S. Munitions Export Controls Need Improvement, General Accounting Office, Rep. No. ID - 78 - 62, Apr. 25, 1979.

¹⁴⁶ Export Controls on Commercial Sales of Militarily Critical Equipment and Technology, Harvey & Simon, in International Transactions... supra at no. 134, page: 60.

¹⁴⁷ 22 C.F.R. Secs. 122.01, 127.07, 127.03.

¹⁴⁸ 22 C.F.R. Part 125, Secs. 125.01-125.24. Under 22 C.F.R. Secs. 123.16 and 124.01, licences or approvals are also required in order to propose to foreign governments or foreign nationals the sale of significant combat equipment included on the Munitions List, or, to make arrangements for the manufacture abroad of such equipment, or to furnish
(Footnote Continued)

export of such data outside the U.S. or to disclosure of this data to foreign nationals within the U.S.

In practice, as a precedent to its grant of a license or approval to export items on the Munitions List, the State Department generally requires that contracts contain provisions similar to those contained in FMS LOAs. Potential transfer of the items in question to third parties is a matter of particular State Department concern.

The export of technical data related to defense articles is also subject to strict control.¹⁴⁹ An export license is required for the export of such data under both the FMS and DCS process.¹⁵⁰ Requests for technical data are forwarded to DSAA for approval. Such data is released only if it is in the best interest of the United States to do so.¹⁵¹

In case of awarding an FMS - financed contract, the contractor must certify to the right of the USG to have access to all books, documents, papers, or records directly related to the sale. He is also required to certify to DSAA that he has complied with all prohibitions against the receipt of gifts

(Footnote Continued)
technical assistance relative to the manufacture of such equipment.

¹⁴⁹ DoD Instruction 5010.12 - Management of Technical Data.

¹⁵⁰ See: Export Licenses and Technology Transfer, COL Bruce Meiser, USAF, The DISAM Journal, Vol. 7, No. 1, Fall 1984, pp. 81 - 84.

¹⁵¹ Briefing Papers, supra at no. 12.

and gratuities which may have been agreed in connection with the contract in question.¹⁵²

Finally, if the State Department makes a determination that a particular sale was not made in the best interest of world peace, U.S. security, or U.S. foreign policy, the license of the responsible contractor may be denied, revoked, suspended, or amended, without prior notice.¹⁵³

D. CONTINGENT FEES

The contractors who engage in DCSs generally utilize **selling agents**.¹⁵⁴ Selling agent are independent contractors, however, and, as such, they are required to comply fully with the Foreign Corrupt Practices Act.¹⁵⁵

When a DCS is financed by an FMS case program, some limitations apply. Contingent fees may be paid only to bona fide employees or established selling agencies, and improper influence should not be exerted in order to solicit or obtain a contract. Under DFARS provisions, [25.7305(d)], the maximum allowable cost of sales commissions and contingent fees is \$50,000.¹⁵⁶ If a DCS is not financed by an FMS case, no limitation exists with respect to contingent fees.

¹⁵² For other certification examples, see: Briefing Papers, supra at no. 12, page 8.

¹⁵³ 22 C.F.R. Sec. 123.05.

¹⁵⁴ See: Use of Agents in International Defense Sales - An Industry Perspective, Dennis R. Lewis, in International Transactions..., supra at no. 134, pp. 149 - 167.

¹⁵⁵ 15 U.S.C. Sections 78m(b), 78dd-1, 78dd-2, 78f.

¹⁵⁶ A substantial number of countries do not allow any sales commissions or fees to be included as part of their FMS agreements, however.

E. DISPUTE RESOLUTION

1. INTRODUCTION

A foreign government may sometimes fail to make payments due under an FMS contract. However, if the contractor has completed his performance, he is entitled to full payment from the USG.¹⁵⁷ If the sale is a government - to - government sale, disputes between the contractor and the USG are subject to standard governmental contract disputes rules. Of more importance, however, are the disputes which arise in connection with DCSs. There are three fora for the resolution of such disputes exist: Litigation, arbitration and a number of alternative procedures.¹⁵⁸

2. LITIGATION

If contractual disputes do arise, U.S. contractors prefer that such disputes be litigated in U.S. courts. Most foreign governments do not wish to appear in this forum, however.

Litigation in foreign courts is also a possibility; however, the foreign purchaser's legal system is generally unfamiliar to U.S. contractor and is often resisted.

¹⁵⁷ Purchaser's Liability in Foreign Military Sales Transactions, The DISAM Journal, Vol. 6, No. 1, Fall 1983, pp. 79 - 93.

¹⁵⁸ See: Recent International Procurement Developments Before the Courts, the Boards of Contract Appeals, and the Comptroller General, Martin J. Golub and Sandra Lee Fenske of Seyfarth - Shaw - Fair - Weather & Geraldson, Washington, D.C., in International Transactions..., supra at no. 134, pp. 128-145.

3. ALTERNATIVE DISPUTE RESOLUTION

a) ARBITRATION

As in the case of a large number of other disputes of an international character, **institutions** (such as International Chamber of Commerce), or **ad hoc** arbitration are generally utilized to resolve disputes evolving from DCSs. However, as in the cases of litigation, these methods consume an extensive period of time and may be very expensive.¹⁵⁹

b) OTHERS

(1) MINITRIALS

Minitrials, another form of dispute resolution, involve a summary presentation made by both parties, lasting, at the most, three days. It is followed by a negotiation process. The parties are represented by senior foreign government officials and company executives and strive to achieve an **out - of - court settlement**. Minitrials are less adversarial, consume much less time, and are far less expensive than the methods of dispute resolution previously discussed.¹⁶⁰

(2) CONCILIATION AND MEDIATION

Conciliation (the adjustment and settlement of a dispute in a friendly and non - antagonistic manner,) and **mediation** (the act of a third person in mediating between two

¹⁵⁹ An Overview of the International Sale..., in International Transactions..., supra at no. 134, page: 22.

¹⁶⁰ Briefing Papers, supra at no. 12.

contending parties with the purpose of persuading them to adjust or resolve their disputes,) are alternative dispute resolution forms which are becoming increasingly popular.¹⁶¹

(3) PROGRESSIVE NEGOTIATION

Progressive negotiation, involving a series of negotiations, is seen as an alternative dispute resolution technique of the future. If attempts to settle a dispute fail, this procedure calls for succeeding negotiations to occur within a fixed period of time. If the parties cannot arrive at a settlement within a certain time period, they then resort to mediation, conciliation, or minitrials.¹⁶²

(4) SYNERGISTIC RESOLUTION

Synergistic Resolution also constitutes a potential method of dispute resolution. In order to stipulate the non-disputed and disputed facts, each party's position as to what the outcome of the dispute should be, a jointly proposed settlement, and the economic short-term and long-term costs and benefits of the other dispute resolution methods, at the outset of this procedure, a small team of middle-management personnel representing both the state and the foreign contractor convenes. These stipulated facts are then presented to state and contractor executive personnel. These state officials and corporate executives then enter into negotiations. The negotiation period extends a

¹⁶¹ An Overview of the International Sale..., in International Transactions, supra at no. 134, page: 26.

¹⁶² An Overview of the International Sale..., in International Transactions..., supra at no. 134, pp. 27.

maximum 30 days. If agreement is not reached, the dispute is referred to a mediator. ¹⁶³

¹⁶³ An Overview of the International sale..., in International Transactions..., supra at no. 134, pp. 24 - 28.

VIII. FMS CREDIT PROGRAM: "FMSCR" ¹⁶⁴

A. INTRODUCTION

FMS transactions may be undertaken for either cash or for credit. In a **cash sale**, upon acceptance of the LOA, full payment must be made by the customer. When the funds are received by the Security Assistance Accounting Center (SAAC), they are placed in the FMS Trust Fund Account.

The FMSCR program provides for a number of **government loans**. Utilizing these loan procedures, selected allied and friendly foreign governments may acquire U.S. defense articles, services, and military training. As a condition for this financing, however, the DSAA requires foreign governments or international organizations to comply with U.S. cargo preference laws. ¹⁶⁵

Since FY 1985, FMSCR loans have been provided through the Congressional appropriations process. Normally, both principal and interest payments should be completed within twelve years. ¹⁶⁶

B. DIRECT U.S. GOVERNMENT CREDITS

Under the provisions of the AECA, Sec. 23, the USG may finance FMS cases by granting credit. Moreover, Congress may

¹⁶⁴ Foreign Military Sales Financing Program, in United States Arms Transfer and Security Assistance Programs, *supra* at no. 12, pp. 142 - 147.

¹⁶⁵ Gast, *The Implementation...*, *supra* at no. 17, page: 47.

¹⁶⁶ P.L. 98-473, October 12, 1984. See: Mortsof - Samelson, *supra* at no 9, page 69.

provide for the extension of concessionary terms for FMS credit financing. This action is based on an analysis of a number of criteria, to include economic need, importance to U.S. security, per capita income level, the country's strategic importance, and applicable defense cooperation agreements with key allies and friends.¹⁶⁷

Credits are varied in nature. They may be granted at an interest rate reflecting the actual cost of the purchase to the USG. These are "treasury rate loans". "Concessional rate loans" are provided at half the interest rate of treasury rate loans.¹⁶⁸ The minimum loan interest rate is 5 %. Finally, there are "forgiven loans or credits". Countries provided such "loans" incur no financial liability.¹⁶⁹

Credits are subject to the appropriation limitations of the legislative branch. This plays an important role in U.S. foreign policy matters.

¹⁶⁷ U.S. Security Assistance and Arms Transfer Policies for the 1980's, Staff Report to the House Comm. on For. Aff. 15, (Comm. print 1981) in Matheson, Security Assistance, supra at no. 5, page 14-67.

¹⁶⁸ Foreign Military Sales, (FMS) Concessional Interest Rate Loans: Determination of Country Eligibility, Clive D. Luckenbill, The DISAM Journal, Vol. 8, No. 4, Summer 1986, pp. 72 - 74.

¹⁶⁹ For example, Israel and Egypt. (Sec. 31, AECA). As an element of the FMSCR Program, the "forgiven loan" or "forgiven credit" was first effected after the 1973 Middle East War. Under a Congressional stipulation, Israel was furnished with \$1.5 billion in FMSCR financing by an emergency supplemental FY 1974 appropriation and was relieved of its contractual liability for the repayment of this loan. See: Mortsof - Samelson, supra at no. 9, page 79. Emergency Security Assistance Act of 1973, in Legislation on Foreign Relations Through 1984, supra at no. 4, pp. 422 - 423.

All credit agreements are negotiated by the DSAA. DSAA's negotiating authority includes, but is not limited to, establishing credit limits, terms of repayment, and interest charges. For direct loans, a fixed interest rate is determined prior to the conclusion of the loan agreement. This rate reflects the cost of the money to the USG on the last day of the month preceding the month in which the loan agreement is signed. Approved loan funds are placed in the Trust Fund for the use of country or international organization concerned.

C. GUARANTEED LOANS 170

Unlike direct loans, in accordance with Sec. 24, AECA, the interest rate of Guaranteed Loans is determined for each individual disbursement of funds. The rate is based on the cost of money to the USG on the day the loan is advanced.

This form of financing requires agreements between the USG - and foreign government, the USG and the commercial financial source, and, finally, between the commercial financial source and the foreign government. Under a loan guarantee, the commercial lender, the Federal Financing Bank (FFB) makes the payments to the DSAA Accounting Center or to the military department concerned. Payments are then deposited

¹⁷⁰ Loan Guaranties Under the Arms Export Control Act, Jerome H. Silber, The DISAM Newsletter, Vol. 4, No. 2, Winter 1981 - 1982, pp. 44 - 46.

in the customer's trust fund account ¹⁷¹ and are used to either pay the contractor or reimburse DoD. ¹⁷²

FMS guaranteed loans are made available at rates of interest equal to the cost of the money to the FFB and a 1/8 % administrative surcharge. ¹⁷³

When countries obtain FMS loans under the Guaranty Loan Program and are in arrears in their loan payments or have defaulted in such payments, the **Guaranteed Reserve Fund (GRF)** is utilized. ¹⁷⁴

D. DIRECT COMMERCIAL SALES

¹⁷¹ See: How Military Sales Trust Funds Operate: Saudi Arabian and Iranian Funds Compared, General Accounting Office, Rep. No. FGSMD - 80 - 26, Jan. 28, 1980.

¹⁷² Loan funds may be used for both FMS transactions or direct commercial sales. An alternative to loan financing are "loan guarantees". Under this approach, the USG guarantees repayment of a commercial loan established for an FMS case. The **Federal Financing Bank (FFB)** is an instrument of the USG. It is under the direction of Secretary of Treasury. It provides the loans for the guaranteed loan program. See: Briefing Papers, supra at no. 12, page 6.

¹⁷³ Matheson, Security Assistance, supra at no. 5, page 14-68.

¹⁷⁴ The GRF's function is that of a revolving fund. Monies drawn are used to repay the lenders, such as the FFB. Any subsequent country repayments are used to restore the fund. In FY 1986, the Administration was granted the legislative authority to use the FMS Financing Program appropriated funds to pay financial claims made in conjunction with the Guaranty Loan Program. At that time, the GRF did not have the requisite amount of funds. (Sec. 106b, P.L. 99-83). As a further means of replenishing the GRF, P.L. 100-71 provided the authority to draw upon Military Assistance Program (MAP) appropriations. See: Supplemental FY 1987 and Pending FY 1988 Security Assistance Appropriations, Louis J. Samelson, The DISAM Journal, Vol. 10, No. 1, Fall 1987, pp. 8-10.

If a sale is financed by DoD financial sources, i.e., it is an "FMS financed sale". DCSs are strictly regulated by the USG. The government thus dictates many of the terms of the sale, to include contract pricing, payments, ocean shipping, etc. This form of DCS may not include allowable costs exceeding \$50,000 in the form of commissions and contingent fees.¹⁷⁵

¹⁷⁵ **Leases and Loans to Foreign Governments and International Organizations**, MAJ Richard J. Erickson, USAF, The DISAM Newsletter, Vol. 4, No. 3, Spring 1982, pp. 85 - 86. For the policy notice of the DoD, see: Approval for Financing Under AECA of Direct Commercial Contracts Between Private Suppliers and Foreign Governments, Federal Register Vol. 50, No. 201, Oct. 17, 1985.

IX. OTHER SECURITY ASSISTANCE PROGRAMS

A number of other SA programs contribute to the security, stability and development of friendly and allied countries. Among such programs are disaster assistance,¹⁷⁶ international narcotics control assistance,¹⁷⁷ and humanitarian assistance.¹⁷⁸ The most significant programs are examined below.¹⁷⁹

A. MILITARY ASSISTANCE PROGRAM: THE "GRANT AID PROGRAM"

The first application of the Military Assistance Program (MAP) occurred in the context of the Greek - Turkey Aid Act of 1947. Between 1947 and FY 1982, the U.S. provided, worldwide, more than \$54 million of military equipment and services. After FY 1981, the scope of MAP appropriations was reduced.¹⁸⁰

MAP was established by 22 U.S.C., Sec.2311. Its principal purpose is to strengthen U.S. security. Through MAP, each year, the President is authorized specific dollar amounts in order to furnish military assistance to friendly countries or international organizations.

¹⁷⁶ Chapter 9, part I, FAA.

¹⁷⁷ Chapter 8, part I, FAA.

¹⁷⁸ The Migration and Refugee Act, 22 U.S.C. Secs. 2601-2605.

¹⁷⁹ See also: Other Security Assistance Programs, in United States Arms Transfer and Security Assistance Programs, supra at no. 12, pp. 106 - 111.

¹⁸⁰ Mortsolff - Samelson, supra at no. 9, page 69.

Under Sec. 644, FAA, military assistance can also be provided by loan or grant of defense articles and services. Additionally, members of the U.S. Armed Forces and other DoD personnel may be assigned or detailed to perform certain duties of a "non-combatant nature". Finally, in order to enable a recipient country to pay for purchases of U.S. defense articles and services concluded under the AECA, MAP funds provided to that country may be transferred to the country's AECA account.

B. INTERNATIONAL MILITARY EDUCATION AND

TRAINING ¹⁸¹

The legal basis for International Military Education and Training (IMET) is found in 22 U.S.C. 2347. It is a grant program, which, under Sec. 541, FAA, authorizes the President specific dollar amounts each fiscal year to furnish military education and training to military and related civilian personnel of foreign countries. ¹⁸² Training may take place both in the U.S. and abroad. In conjunction with foreign officer observation and orientation visits to military installations, IMET is perhaps the most effective means of fostering mutually beneficial relations between the U.S. military services and those of participating countries. Through the IMET program, the self - reliance of allied and

¹⁸¹ See: International Military Education and Training, in United States Arms Transfer and Security Assistance Programs, supra at no. 12, pp. 43 - 45, 129 - 131.

¹⁸² See: The U.S. Army Training Program for Allied Students, Thomas E. Schnurr - Allen F. Hoover, The DISAM Journal, Vol. 8, No. 1, Fall 1985, pp. 94 - 99. The International Military Education and Training (IMET) Program, Spiro C. Manolas, The DISAM Journal, Vol. 6, No. 1, Fall 1983, pp. 12 - 16.

friendly countries is increased, and their ability to effectively utilize their resources is enhanced. Moreover, IMET serves to expose future leaders of allied and friendly countries' leaders to the U.S. and U.S. citizens. ¹⁸³

C. ANTITERRORISM ASSISTANCE

The Antiterrorism Assistance Program (22 U.S.C. 2349aa) was established by Sec. 571, FAA. Its function is to deter terrorist activities by enabling foreign countries to enhance antiterrorism capabilities of their law enforcement personnel. The Assistant Secretary of State for Human Rights and Humanitarian Affairs administers this program and determines the countries to be provided assistance and the form of assistance to be furnished. A unique feature of this program is that training must be carried out within the U.S. Moreover, to the maximum extent possible, the U.S. advisory personnel must perform their duties within the U.S.

D. ECONOMIC SUPPORT FUND

The Economic Support Fund (ESF) (22 U.S.C. 2346) is an important aspect of the economic assistance available under

¹⁸³ Congressional Presentation for Security Assistance Programs, FY 1988, supra at no. 18, page: 21. There appear to be three principal and sometimes competing Congressional points of view concerning IMET: (Mortsoff - Samelson, supra at no. 9, pp. 76-77) The IMET Program is a principal means of maintaining and enhancing valuable military - to - military relations among allied and friendly nations. Some contend, however, that the program aligns the U.S. too closely with many military dictatorships. Finally, the argument is posed that the Administration uses the IMET Program as a ruse in order to provide high - income countries with small IMET grants and thus permits these countries to purchase additional military training at special discounted FMS tuition rates, well below the FMS cost to non - IMET Program recipient countries.

the FAA. Under Sec. 531, FAA, when particular national interests of the U.S. so dictate, the President is authorized to provide economic support in specific dollar amounts to certain countries. These ESF funds may be used only for economic programs; they may not be used either for either military or paramilitary purposes. ¹⁸⁴

"Base rights countries", "access rights countries", and countries which participate in regional security arrangements supported by the U.S., conscious of the fact that the U.S. is essentially acting in its own national interest in its dealings with them, expect to derive benefits in return for their grants of certain rights to the U.S. From their perspective, it is essential that mutual benefits be derived from their relationships with the U.S. if common goals are to be achieved and the close relationships maintained.

ESF programs are administered by the Agency for International Development (AID), which functions under the direction of

¹⁸⁴ Sec. 531(c), FAA. In his materials, Matheson poses this question: "...Would ESF funds be available for the financial support of political organizations in foreign countries whose activities are considered to be in U.S. foreign policy and national security interests?" (Matheson, Security Assistance, supra at no. 5, page 14-37). I view such a policy of financially supporting foreign political organizations which support U.S. foreign policy and national interests to be a very dangerous one. Such a policy is incompatible with specific principles of international law and the democratic philosophy of the Western World. It is a contemporary dilemma of all states that, in practice, policy considerations often prevail over international law. However, even those actions undertaken under the so called "vital national interest" concept, must, on a case by case basis, be legally arguable. Thus, answering the above question, I conclude that U.S. economic support to individual political organizations within foreign states would violate the basic concepts of state sovereignty and political independence.

the State Department. ¹⁸⁵ Currently, Israel is the largest recipient of such funds.

E. PEACEKEEPING OPERATIONS

Under the provisions of 22 U.S.C. 2348, Chapter 6, Part II, FAA, Peacekeeping Operations (PKO), the U.S. may provide financial assistance, and other material (such as fuel), services (such as airlift), and other equipment and supplies to friendly countries and international organizations for peacekeeping purposes. ¹⁸⁶

The PKO program is administered by the State Department. ¹⁸⁷

Current PKO recipients include, the United Nations Force in Cyprus (UNFICYP), and the Multinational Force and Observers (MFO) in Egypt (the Sinai).

¹⁸⁵ There are other means of assistance which contribute to the overall purpose of the security assistance system: The Overseas Private Investment Corporation (OPIC) (Insurance and financing for private projects), Title IV, Chapter 2, FAA (22 U.S.C. Secs. 2191-2200b); (Contribution to and participation in the development programs of the World Bank, U.N., etc.), Chapter 3, part I, FAA (22 U.S.C. Secs. 2221-2226); the Agricultural Trade Development and Assistance Act of 1954, "P.L. 480", 7 U.S.C. Secs. 1691-1735n; the Peace Corps Act, 22 U.S.C. Secs. 2501-2523; and the Export - Import Bank Act, 12 U.S.C. Secs. 635-635n, Sec. 7.

¹⁸⁶ This authority is in addition to that provided in the U.N. Participation Act (UNPA), Sec. 7, 22 U.S.C. Sec. 287d-1.

¹⁸⁷ See: Executive Order No. 12163 (1979), as amended.

X. CONCLUSION

The need for an effective system of cooperative international defense for the Western World is unquestioned. Yet, such cooperative defense must be achieved among nations which share the same ideals but which have dramatically social, economic and political differences.

The United States, as the leader of the free world, bears the greatest responsibility for the achievement of an effective security system. Survival of the free world is the historic mission of the United States. The success of this mission, to a very great extent, depends upon the manner in which the United States administers its security assistance program.

An effective security relationship must be built upon a foundation of mutual interests and benefits. Accordingly, the U.S. security assistance program must be complemented by other forms of foreign assistance.

The Foreign Military Sales Program is the principal element of the entire security assistance program. Recent events clearly reflect that, if this essential program is to be administered effectively and fairly, relationship between the U.S. executive and legislative branches in the area of foreign policy must be much more clearly defined.

In its determination as to whether to provide security assistance (often in the form of FMS sales) to certain countries, the U.S. must take into consideration the need for mutual respect and be sensitive to the fact that allied and friendly countries place great value in their political independence. Only if this occurs will a truly effective cooperative security system be possible.

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